Supreme Court, U.S.
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No. 02-

IN THE
Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC.,
and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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147 pp

QUESTIONS PRESENTED

Where the City, in its regulatory and proprietary capacities, adopted an ordinance that: (i) established procedures by which telephone companies should obtain permission to use the public rights-of-way; (ii) provided for the payment of compensation to the City for that use; and (iii) established conditions regulating such use –

1. Whether the court of appeals properly preempted provisions of the City's ordinance based on an unfair competition standard instead of the "prohibitory" test prescribed in Section 253(a) of the Communications Act?

2. Whether federal courts, having found a local government's franchising ordinance to be prohibitory "as a whole," can preempt under Section 253(a) severable provisions found to fall outside the management and compensation "carve-out" from that subsection effected by subsection (c), without finding the individual provisions to be themselves prohibitory?

3. Whether, under Section 253(c), which excludes from federal preemption under subsection (a) compensation that is "competitively neutral and nondiscriminatory," the City must impose the identical rate of compensation going forward on all telephone companies, including even the incumbent telephone company which had previously entered the rights-of-way under non-comparable circumstances?

4. Whether the courts below, relying on what was effectively a strict scrutiny test, properly preempted in advance of application the Common Council's legislative adoption of a "public interest"

standard to govern franchising of the City's rights-of-way?

5. Whether the federal courts may preempt the City's legislative decision to vest in the Common Council final discretion to consent to the use of the City's rights-of-way by specific telecommunications providers?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings below were the City of White Plains, defendant and petitioner here, and TCG New York, Inc., TC Systems, Inc., and Teleport Communications dba TCNY, co-plaintiffs and respondents here.

The petitioner is a municipal corporation.

The opinion in the District Court recites that the plaintiffs-respondents are wholly owned subsidiaries of AT&T Corp., a publicly traded company. (Pet. App. at 27a)

Briefs amici were filed below by WorldCom, Inc., City of New York, the New York State Conference of Mayors and Municipal Officials, and jointly the International Municipal Lawyers Association, the Town of Colonie, N.Y., the National Association of Telecommunications Officers and Advisors, the U.S. Conference of Mayors, and the National League of Cities. A brief amici and a supplemental brief amici were filed jointly by the Federal Communications Commission and the United States.

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In the
SUPREME COURT OF THE UNITED STATES

CITY OF WHITE PLAINS,

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v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the City of White Plains, New York ("White Plains" or the "City"), respectfully prays that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on September 12, 2002, in this case.

OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of New York (Pet. App. 27a-66a) is reported at 125 F.Supp.2d 81 (2000). The decision of the U.S. Court of Appeals for the Second Circuit (Pet. App. 1a-26a), filed September 12, 2002, is reported at 305 F.3d 67. The opinion was modified on September 20, 2002.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on September 12, 2002, and the accompanying opinion was corrected by order of the clerk on September 20, 2002. The jurisdiction of this Court to review the judgment and opinion below is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction over respondents' complaint under 28 U.S.C. §§ 1331 and 1337. By letter dated December 2, 2002, Justice Ginsburg extended the City's time for filing this petition to January 10, 2003 (Pet. App. 1e-2e).

NOTIFICATIONS PURSUANT TO RULE 29(B) AND (C)

While the Federal Communications Commission ("FCC") and the United States jointly filed a brief amici in the court of appeals on June 12, 2001, and filed a supplemental brief on March 11, 2002, neither is a party, and the Solicitor General has been notified pursuant to 28 U.S.C. § 2403(a) under Rule 29(4)(c). It does not appear that the Attorney General of the State of New York was notified below that the constitutionality of a statute of the State within the meaning of Section 2403(b)[1] has been called into question; this has now been done by means of service of this petition.

STATUTES, RULES, AND ORDINANCES INVOLVED

The following statutory and constitutional provisions are set forth verbatim in the text, pursuant to Rule 14.1(f). This case involves the application of, and constitutionality of, Section 253(a)-(d), 47 U.S.C. § 253(a)-(d) ("Section 253"), which was added to the

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[1] *See* 17 Wright & Miller, Federal Practice and Procedure, § 4037 n.59 (2d ed. 1988) (local ordinance qualifies as state statute for appeal under 28 U.S.C. § 1254[2]) (1988).

Communications Act of 1934 (the "Communications Act") by Section 101(a) of the Telecommunications Act of 1996 (the "1996 Act"), 110 Stat. 56, 70:

> Sec. 253. REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminately basis, if the compensation required is publicly disclosed by such government.
>
> (d) PREEMPTION. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that

> violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Also involved is Section 601(c)(1) of the 1996 Act, 110 Stat. 56, 143, 47 U.S.C. § 152 nt, which reads as follows:

> Sec. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.
>
> * * *
>
> (c) FEDERAL, STATE, AND LOCAL LAW. –
>
> (1) NO IMPLIED EFFECT. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.
>
> * * *

This case also involves three provisions of the United States Constitution. The Commerce Clause, U.S. CONST. art. I, § 9, states:

> The Congress shall have Power . . . To regulate Commerce . . . among the several states . . . .

The Guaranty Clause, U.S. CONST. art. IV, § 4, states:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Takings Clause, U.S. CONST. amend. V, states:

> [N]or shall private property be taken for public use, without just compensation.

The decisions below pre-empted in part the City's 1997 Telecommunications Franchising and Licensing ordinance (the "Ordinance"), which appears in the statutory appendix to this petition (Pet. App. 1b).

STATEMENT OF THE CASE

This case arose out of the efforts of White Plains to respond to new burdens created by the adoption of the 1996 Act. In 1997, White Plains enacted the Ordinance in order to satisfy the City's rights-of-way management responsibilities in the new world of competitive telecommunications providers envisioned by Congress, and to comply with new statutory standards imposed by Section 253. The plaintiffs below, which are subsidiaries of AT&T Corp., challenged the City's authority to adopt and enforce the Ordinance, asserting that the Ordinance violated Section 253. New York law authorizes White Plains to control the use of its rights-of-way by telecommunications providers.[2]

The Competitive Regulatory Model of the 1996 Act. The 1996 Act amended the Communications Act to foster competition in the provision of telecommunications and cable television services. *See* title of the 1996 Act, 110 Stat. 56. Common carrier services had traditionally been regulated as *de facto* monopolies. *See FCC v. RCA Communications*, 346 U.S. 86, 92 (1953) ("Three Circuits" case); *but cf. Maryland v. U.S.*, 460 U.S. 1001, 1002 (1983) (AT&T divestiture). The 1996 amendments to Title II (Common Carriers) of the Communications Act were intended to convert regulation of the telecommunications industry from a model based on the traditional presumption

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[2] *See, e.g.*, City of White Plains Charter, § 33, 1915 N.Y. Laws Ch. 356 ("City Charter"); N.Y. Transp. Corp. Law § 27 (Consol. 2001); N.Y. Gen. City Law § 20(10) (Consol. 2001); N.Y. Stat. of Local Gov't Law § 10(5) (Consol. 2001); N.Y. Mun. Home Rule Law §§ 10(6), (11) and (12) (Consol. 2001).

that telecommunications providers were monopolies, to a model based on the presumption that competition was possible and to be encouraged. Pet. App. at 37a; ("pro-competitive goals"), Pet. App. at 20a. This Court has had occasion to consider the application of certain aspects of the new competitive regulatory model to regulation of the providers of telecommunications services. *See, e.g., Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland,* 535 U.S. 635 (2002) (§§ 251-52); *NCTA v. Gulf Power Co.,* 534 U.S. 327 (2002) (§ 224); *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) (§§ 2[b], 251-52). The Court has not, however, addressed any of the issues presented by this case.

Congress added Section 253 to the Communications Act as part of the 1996 Act's regulatory overhaul. Section 253(a) was designed to effect the 1996 Act's generally pro-competitive purpose by preempting any remnants of monopoly-based regulation by the states and local governments. Congress, however, expressly limited the preemptive scope of Section 253(a) and preserved state and local authority, in several ways. Section 253(b) excluded from preemption the role of state regulation under the 1996 Act in effecting universal service, public safety and welfare, service quality, and consumer rights. Section 253(c) of the 1996 Act similarly excluded from preemption the ability of local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis" for providers' "use" of the public rights-of-way. And in Section 253(d), Congress carved out from the FCC's implied jurisdiction under Sections 1 and 4(i) of the Communications Act, 47 U.S.C. §§ 151, 154(i), "to execute and enforce the provisions" of the Communications Act, any jurisdiction to issue preemptive

orders with respect to local activities within subsection (c), leaving jurisdiction of those matters to the courts.[3]

In addition, Congress further limited any preemptive effect of the 1996 Act to express preemption, by negating implied preemption in Section 601(c)(1) of the 1996 Act.

In other words, Congress very carefully and specifically left in the hands of local governments the responsibility for managing multiple uses – telecommunications and non-telecommunications – in their public rights-of-way.. The 1996 Act did not attempt to commandeer local governments to affirmatively advance competition, *Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 104 (1st Cir. 1999), but local governments now became responsible for accommodating in their rights-of-way not only the lines of the incumbent telephone company, the gas, water, and electric utilities, the cable television and OVS[4] operators, and the sewer authority, but also an increasing and unpredictable number of competitive telephone providers. Section 253(c) of 1996 Act left with local governments the continuing responsibility to coordinate all these special users and to minimize any adverse impact from installation and maintenance of subsurface facilities with surface use by the public users, *viz.*, pedestrians, motor vehicles, and the like. Congress recognized that the Federal government could not do that from Washington. *See* 141

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[3] The same Congressional respect for the role of local governments is reflected in the drafting of Section 332(c)(7), which largely left in place the traditional and preeminent role of local governments in zoning matters and provided for appeals directly to "any court of competent jurisdiction." *See FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (regulation of land use is "perhaps the quintessential state activity"); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities").

[4] Congress contemplated the creation of a new class of lightly regulated "open video systems." *See* 47 U.S.C. § 573.

Cong. Rec. S8173 (daily ed. June 12, 1995) (statement of Sen. Kempthorne). Local governments retain the prerogative to recover their regulatory costs in the form of user fees.[5] At the same time, Congress recognized the proprietary right of local governments to receive compensation for the use of their property, *i.e.*, the public rights-of-way, by private parties for profit.[6]

The ability to receive compensation for use derives from whatever proprietary powers a local government may have under state law, and Congress did not use language intended to "crowd" the Fifth Amendment by taking away those property rights. *See U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (Fifth Amendment protects municipal property just as private property). The 1996 Congress was particularly interested in respecting local and state authority under our federal system. "The Federal Government has absolutely no business telling state and local government how to price access to their local right-of-way." 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton); *see also* at H8461.

The City's Ordinance Was a Prudent Response to the New Environment. White Plains recognized that the 1996 Act would require changes in how the City managed its rights-of-way. Not only did Section 253 impose federal legal standards for the first time, but the entire premise of the 1996 Act was that numerous new providers would be competing to serve customers in White Plains. Many of these providers – nobody could say how many – would presumably require access to the City's rights-of-way, whereas in the past only Verizon and its predecessors had any significant presence in

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[5] N.Y. Stat. of Local Gov't Law § 10(5) (Consol. 2001).

[6] *Id.*; *see also* N.Y. Gen. City Law §20(7) (Consol. 2001); N.Y. Stat. of Local Gov't. Law § 10(5) (Consol. 2001); N.Y. Mun. Home Rule Law §§ 10(6), (11), (12) (Consol. 2001).

the City's rights-of-way.[7] The activities of these new rights-of-way users would impose new burdens on White Plains, and raised new questions about the policies White Plains should pursue with regard to management of its rights-of-way and seeking compensation for the use of City property by telecommunications providers. For one thing, the new federal law seemed to require a prudent local government to take steps to ensure that providers in comparable circumstances would be treated in comparable fashion.

The 1996 Act did not dictate that White Plains adopt a particular approach for dealing with the new competitive environment. Indeed, because Section 253(c) preserved local authority over management and compensation, White Plains had a range of policy options, so long as it did not prohibit competitors from operating in the City. Accordingly, to facilitate the entry of multiple providers while protecting the City's interests in its property and the safety of the public, the City Council passed the Ordinance (Pet. App. 1b-14b). As authorized by state law,[8] the Ordinance in general terms requires that telecommunications providers apply for municipal permission before emplacing their facilities in, and using them in their private businesses within, the public rights-of-way. The Ordinance requires telecommunications providers to first apply for franchises granting them the general right to use or occupy the City's rights-of-way. Ordinance § 2-1-01 (Pet. App. 5b). The specific terms of a franchise are to be negotiated between the provider and the City. Ordinance § 2-6 (Pet. App. 8b-9b). The subjects to be addressed in a franchise agreement are specified in the Ordinance. Ordinance § 2-9 (Pet. App. 11b-13b). In addition to obtaining a franchise, providers must comply with policies, rules and requirements adopted by the

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[7] Before 1996, in addition to Verizon, only one telecommunications provider was occupying the City's rights-of-way under a franchise.

[8] *See* note 2, *supra*.

City to carry out the purposes of the Ordinance, and must obtain construction permits before installing equipment or doing other work in the rights-of way. Ordinance § 2-2-02 (Pet. App. 7b).

After negotiations with various providers during the period leading up to and following adoption of the Ordinance, White Plains entered into a number of franchise and license agreements under the Ordinance. The franchise agreements provided for, among other things, compensation at the rate of five percent of gross revenues – much like that applicable to cable operators under Section 622(b) of the Cable Act of 1984, as amended, 47 U.S.C. § 542(b). The cable franchise fee constitutes "rent" for the use of the rights-of-way. *See Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98, (5th Cir. 1997), *citing City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893), *on rehearing*, 149 U.S. 465 (1893). The City Charter authorizes the City to base compensation for use of the streets on the payment of a percentage of gross receipts. City Charter § 33.

The Course of the Proceedings Below. The case below arose when plaintiffs, who were competitive local exchange carriers ("CLECs"), sought to build lines in the City. The plaintiffs had been providing services in White Plains on a resale basis since 1993, but had not installed facilities in the City's rights-of-way. In June 1996, plaintiffs contacted the City to discuss the installation of facilities in the City's rights-of-way. The City was also engaged in negotiations with several other providers during this period. Until the Ordinance was adopted in December 1997, the City had no ordinance or set procedure governing such requests.

On February 10, 1999, plaintiffs submitted an application for a franchise pursuant to the Ordinance. In May 1999, the City presented the plaintiffs with a draft of a franchise agreement with the plaintiffs' name on it (the "May Proposal"); this draft agreement was essentially identical to an agreement that the City had entered into with another

company, and that the City had earlier proposed as a model. Just one month later, on June 18, 1999, the plaintiffs brought suit for preemption of the ordinance and the May Proposal. In August 1999, White Plains sent the plaintiffs a revised draft of the franchise agreement, amending certain provisions to which the plaintiffs had objected (the "August Proposal"). Among other things, the August Proposal provided for payment of a franchise fee of 5% of annual gross revenues. August Proposal § 8.1 (Pet. App. 2d). The courts below based their decisions on the August Proposal.

Among the claims made by the plaintiffs were that the Ordinance and the August Proposal tended to prohibit the provision of telecommunications services within the meaning of Section 253(a) because the incumbent local exchange provider ("ILEC"), Verizon, was not required to (1) obtain a franchise and (2) pay the franchise fee. Verizon, through its predecessors, had been in the City's rights-of-way since before the City's incorporation in 1915, and since 1919 has provided free conduit for use by the City by way of *quid pro quo*. The total extent of that free conduit is now 11 miles, and it contains about a third of the City's municipal fiber communications network. The parties stipulated that the value of this free conduit use was not quantified.

The case below was tried before District Judge Parker on stipulated facts. Judge Parker upheld most of the provisions of the Ordinance and the August Proposal, including the compensation provisions, but held a number of provisions to be preempted by Section 253. Pet. App. 27a. Both parties appealed.

After briefing and oral argument, the court of appeals asked the FCC for its views on three questions. Post-Argument Questions for the Second Circuit and the FCC (Jan. 29, 2002) ("*Post-Argument Questions*"), Pet. App. 1c. In a supplemental brief, the FCC responded in general terms, providing only tentative answers.

In Part I of its discussion of the case, the court of appeals discussed the court's jurisdiction and the role of the FCC, stating that the language of Section 253 "counsel[s] against a conclusion that the FCC should decide those issues first." Pet. App. at 11a.

In reviewing the record *de novo* as a question of law (Part II of the opinion), the court of appeals looked to FCC precedents for guidance but found them to be "not controlling." Pet. App. at 14a.

In Part III of its opinion, the court of appeals examined the Ordinance in light of Section 253(a). The court of appeals concluded that two aspects of the Ordinance – and hence the Ordinance as a whole – "clearly have the effect of prohibiting TCG from providing telecommunications service" within the language of Section 253(a). Pet. App. at 15a. Specifically, the court cited the provision of Section 2.7-01(vii) of the Ordinance giving the Council "the right to reject any application based on any 'public interest factors ... that are deemed pertinent by the City,'" and the delay in TCG's receiving a franchise, and concluded that the Ordinance violated Section 253(a) because it posed "obstacles . . . to TCG's ability to compete . . . on a fair basis . . . ." Pet. App. at 15a.

The court of appeals then proceeded to test the contested provisions of the Ordinance and the August Proposal collectively and individually. In Part IV(A) of its opinion, the court first considered, but did not decide, whether the 5% franchise fee set forth in Section 8-1(a) of the August Proposal was "fair and reasonable" in amount. In Part IV(B) of its opinion, recognizing that the statutory phrase "competitively neutral and nondiscriminatory" did not require strict parity between providers, but only comparability, the court of appeals found the compensation provisions of the August Proposal in the aggregate not to be "competitively neutral and nondiscriminatory" on a going-forward basis. Pet. App. at 20a. In doing so, the court of

appeals rejected the district court's finding that the City's ongoing use of free conduit was sufficient to comply with Section 253(c).

In Part V, the court of appeals examined certain provisions of the Ordinance and the August Proposal that did not involve compensation. The court held that various regulatory provisions not "designed to 'manage the public rights-of-way,' as permitted by § 253(c)" were preempted because they "impermissibly" went beyond right-of-way management. Pet. App. at 24a.

In summary, the courts below upheld the vast majority of the provisions of the Ordinance. The district court upheld but limited the scope of application of two record-keeping and inspection requirements.[9] The district court struck provisions which required operators to provide, and the franchise to include, information regarding the services to be provided, as well as provisions which permitted the City to consider the technical, legal, and financial qualifications of the applicant.[10] The district court also struck provisions which permitted the City to consider the adequacy of a proposed agreement in protecting the public interest as well as provisions permitting the City to consider "other public interest factors or considerations" in reviewing an application.[11] The court of appeals upheld these rulings. In addition, the court of appeals struck the compensation provisions of the August Proposal because the City was not requiring comparable compensation of the incumbent. Finally, the court of appeals struck the

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[9] Ordinance, §§ 2-9-01(vi), (viii) (Pet. App. at 12b).

[10] Ordinance, §§ 2-3-02(ii), (vi), (vii); 2-7-01(ii); 2-9-01(ii) (Pet. App. at 7b-9b, 11b).

[11] Ordinance, §§ 2-7-01(vi); (vii); 2-9-01(xvii) (Pet. App. at 10b, 13b).

provisions that required City consent for assignments of a franchise, finding them too broad.[12]

There Is Great Confusion in the Lower Courts About How Section 253 Should Be Interpreted, and Only this Court Can Provide National Uniformity. White Plains is not alone. Local governments all across the United States have been attempting to reconcile their responsibilities as custodians of the public rights-of-way with the requirements of federal law ever since Section 253 was enacted. This has engendered considerable litigation, and as one commentator has stated, "instead of leading to a settled doctrine of law, the increased litigation continues to dispense wildly inconsistent judicial decisions." Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dick. L. Rev. 209, 211 (2002). At least nine courts of appeals (the 1st, 2nd, 3d, 4th, 6th, 8th, 9th, 11th and District of Columbia Circuits) have issued opinions in cases involving the interpretation of Section 253.[13] At least two additional district court decisions are currently under appeal, one in the Ninth Circuit, and another in the Tenth.[14]

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[12] Ordinance, §§ 2-9-01(xii); August Proposal § 14 (Pet. App. 12b, 9d-13d).

[13] *Cablevision of Boston*, 184 F.3d 88; *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *New Jersey Payphone Ass'n, Inc., v. Town of West New York*, 299 F.3d 235 (3d. Cir. 2002); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

[14] *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002), *appeal docketed*, No. 02-35473 (9th Cir. May 14, 2002); *Qwest Corp. v. City of Santa Fe*, 224 F.Supp.2d 1305 (D.N.M. 2002), *appeal docketed*, No. 02-2258 (Sept. 27, 2002).

The reported cases illustrate the lack of uniformity among the lower federal courts. Resolution of the inherent tension between subsection (a) and subsection (c) has proved difficult. There have been numerous expressions of perplexity among the courts of appeals in Section 253 cases.[15] From the outset the courts of appeals have found the syntax of Section 253 difficult to parse. *See, e.g., Cablevision of Boston,* 184 F. 3d at 100-01 (the syntax of Section 253 is difficult to parse); *BellSouth Telecomms, Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1187 (2001) ("confusion arises because of perceived inconsistencies within the structure of [section 253];" *City of Abilene*, 164 F.3d at 52 ("oddity of [Section 253 (a)'s] formulation").[16] This constructional uncertainty underlay the circuit court's post-argument questions to the federal amici below. *See Post-Argument Questions*, Pet. App. 1c. The FCC's supplemental brief in response, particularly the answer to Question 2 on agency jurisdiction, offered only tentative views. *See* Pet. App. at 11a (FCC "declined to make definitive statements" on some issues).

The FCC's response to the post-argument questions demonstrates that the lower courts will not receive instruction in these matters from any source other than this Court. This is because Section 253(d) places the responsibility for parsing Section 253(c) in the hands of the courts. Thus, the FCC "respectfully refrain[ed]" from answering the Court's third post-argument question (Pet.

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[15] *See, e.g., New Jersey Payphone Ass'n,* 299 F.3d 235; *Town of Palm Beach*, 252 F.3d 1169; *Cablevision of Boston*, 184 F.3d 88. The Eighth Circuit in *Missouri Municipal League*, 299 F.3d at 954-55, recently read the applicability of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to the preemptive effect of Section 253(a) differently from the D.C. Circuit in *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

[16] This Court itself observed in *Iowa Utils. Bd.*, 525 U.S. at 397, that "It would be a gross understatement to say that the 1996 Act is not a model of clarity."

App. at 2c) on the meaning of the terms "competitively neutral and nondiscriminatory" in Section 253(c),[17] and the circuit court "agree[d] that the relevant FCC decisions are not controlling." Pet. App. at 14a. Unlike other provisions of the Communications Act, *cf. Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding under the predecessor of Section 203 that national uniformity requires exclusive primary jurisdiction), if there is to be any nationwide uniformity on the function of subsection (c), it must come from this Court.

The proper interpretation of Section 253 is important to both the national economy and the federal structure of our government. Telecommunications providers rely heavily on local rights-of-way to provide their services, and overseeing the construction, maintenance and use of rights-of-way is one of the principal tasks of local governments. Local governments recently have found that the task of managing their rights-of-way has been complicated by a spate of financial failures and sales of many competitive telecommunications providers. Posted on the website of counsel for petitioners[18] is a list of 59 bankruptcy proceedings involving telecommunications providers. In the past year the newspapers have been full of reports of sales of telecommunications providers and facilities. The sum total of all the turmoil is that it has become quite difficult for the cities and the public to identify which entity is responsible for safety violations in the public rights-of-way and for maintaining or removing facilities located in the public rights-of-way. It has also become more difficult to collect payment of compensation for use of the public rights-of-way. These are traditionally and quintessentially the responsibilities of local

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[17] Supplemental Brief of the Federal Communications Commission and the United States as Amici Curiae, filed in the court of appeals March 12, 2002, at 10.

[18] http://www.millervaneaton.com/hot_april3_c.htm.

governments, as Congress recognized when it drafted Section 253(c).

REASONS FOR GRANTING THE PETITION

I. The Structure of Section 253 Has Led to Great Confusion Among the Lower Courts, Which in this Case Led the Court of Appeals To Contravene the Decision of Congress To Preserve the City's Authority Over Public Rights-of-Way Management and Compensation.

In Section 253(c), Congress sought to carve out from the preemptive effect of Section 253(a) all matters dealing with the local governments' management of, and receipt of compensation for the use of, their public rights-of-way for private profit. Because the court of appeals' analysis did not properly reflect the relationship between Sections 253(a) and 253(c), the decision below resolves sensitive issues of intergovernmental relations contrary to the intent of Congress expressed in Section 253(c). As the Third Circuit recently noted, "Section 253 is quite inartfully drafted and has created a fair amount of confusion." *New Jersey Payphone Ass'n*, 299 F.3d at 240. This case offers the Court the opportunity to analyze Section 253 and to instruct the lower courts in its proper application. The decision of the Court of Appeals contains at least two critical instances of flawed analysis arising from confusion over the internal structure of Section 253.

A. "Unfair Competition" Is Not a Proper Ground for Preemption under Section 253(a)'s "Prohibitory" Test.

In Part III of its opinion, the court of appeals "conclude[d] that the Ordinance as a whole" – including the provisions carved out by subsection (c) – violated Section 253(a), Pet. App. at 15a, "in light of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains

on a *fair* basis." Pet. App. at 15a (emphasis supplied). Section 253(a), however, says nothing about preemption on the basis of "fair competition" – it refers only to state and local laws that "prohibit" the provision of service.[19]

"Fair competition" therefore is not the standard Congress prescribed in Section 253 to govern inter-governmental relations. Under the statute, the adjective "fair" applies only to the level of compensation sought to be charged the carrier, and that adjective appears only in Section 253(c). *Cablevision of Boston, supra*, at 105. Furthermore, subsection (a) allows only express preemption, and Section 601(c)(1) instructs that implied preemption will not do. Preemption is limited to certain *prohibitory* regulation.

Although *Dearborn*, 206 F.3d 618, is closely analogous on its facts to this case, the court in that case found no prohibition and did not apply a "fair competition" standard in interpreting Section 253(a). The Second Circuit is the only court of appeals that has applied the "fair competition" standard in determining whether a local requirement is preempted under Section 253(a).

In applying a fair competition test to the ordinance as a whole – rather than confining it to compensation in accord with the statute – the court of appeals improperly gave

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[19] The Court of Appeals did not offer an extensive explanation of the "obstacles" posed by the Ordinance. The two specific concerns cited by the court were the provision of the Ordinance allowing the Common Council to consider "public interest factors," and the "extensive delays" in processing the plaintiffs' request for a franchise. The former issue is addressed at Point II, *infra*. It is unclear what specific "delay" concerned the court. The parties had engaged in talks at various times before and after the adoption of both the 1996 Act and the City's Ordinance. The plaintiffs submitted a formal application for a franchise, as required by the Ordinance, only four months before they filed their complaint. In any case, it is impossible to tell from the court's opinion how much weight was given to either of the two specific "obstacles" the court cites, or to any other factors.

preeminence to the overall pro-competitive purpose of the 1996 Act rather than to the specific anti-preemptive purposes of subsection (c).[20] In enforcing its notion of "fairness," the court of appeals thus ignored the fundamental proposition of statutory construction that general intent does not override the intent of particular provisions to the contrary. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise").

The Second Circuit's replacement of prohibitory effect with fairness is particularly inappropriate because subsection (c) was the result of intense parliamentary maneuvering and debate in the House of Representatives. The language adopted reflected a deliberate rejection on the House floor of the more pre-emptive language reported by the Committee. *See* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995); *see also* discussion at pp. 26-27, *infra*.

Finally, this Court has independently determined that the overall pro-competitive purpose of the 1996 Act does not require that all burdens be lifted from competitors. In considering the "necessary and impair" standard of Section 251(d)(2), which is a much less stringent test than the "prohibitory" standard of Section 253(a), this Court rejected

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[20] In its discussion of Section 253(a), the court of appeals cited an FCC decision that referred to whether a local ordinance "inhibits or limits the ability . . . to compete in a fair and balanced . . . environment. *In re California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd. 14,191, at ¶ 31 (1997). The Court had earlier concluded that FCC decisions were "not controlling," however, and it did not expressly adopt this formulation as the standard for interpreting Section 253(a). Pet. App. at 14d.

"the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to the element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services . . . ." *Iowa Utils. Bd.*, 525 U.S. at 389.

B. Section 253(a) Does Not Authorize Preemption of Severable Provisions that Are Themselves Not Prohibitory.

The court of appeals mis-analyzed the interrelationship and the order of precedence between subsections (a) and (c) of Section 253. The court preempted various provisions of the Ordinance and the August Proposal on the ground that they fell outside the subsection (c) carve-out, without next making the statutorily required finding that those provisions were prohibitory, and therefore within the court's preemptive authority under subsection (a).

In other words, the court of appeals first found the Ordinance as a whole to be a prohibition within the meaning of Section 253(a). The court then proceeded to examine certain individual provisions of the Ordinance and determined that they were not related to management or compensation; not being related to management or compensation, they were deemed preempted solely because the Ordinance as a whole had been declared a "prohibition."[21] But in declaring those individual provisions to be preempted, the court did not consider whether each of the invalidated provisions was itself a prohibition. This kind of bootstrapping is not only illogical, but prohibited by the language of subsection (c).

Subsection (c) can best be understood as an instruction to the courts on how subsection (a) is to be

[21] These provisions include §§ 2-3-02(ii), (vi), (vii); 2-7-01(ii), (vi), (vii); 2-9-01(ii), (xii), (xvii) of the Ordinance, as well as a number of sections of the August Proposal (Pet. App. at 7b-13b).

construed. It uses the language "nothing in this section [253] affects the authority of a State or local government...." As this Court observed of Section 2(b) of the Communications Act ("[N]othing in this Act shall be construed...."), 47 U.S.C. § 152(b), in *Louisiana PSC v. US and FCC*, 476 U.S. 355, 377 n.5 (1986), the section:

> provides its own rule of statutory construction. In other words, the Act itself, in § 152(b), presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220.

With respect to the Communications Act, the Court's decision in *Louisiana PSC* teaches that "nothing means nothing." Thus, literally nothing in Section 253(a) – or subsection (d), for that matter – touches or concerns the localities' right-of-way management and compensation responsibilities.

Instead of applying the correct analysis, the court of appeals offered a rationale to justify its failure to follow the literal language of the statute, *viz.*:

> While we conclude that the Ordinance as a whole violates § 253(a), we must nevertheless analyze whether portions of the Ordinance ... are saved by § 253(c). .... [A]pplying § 253(c) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions.

Pet. App. at 15a-16a.[22] This theory, however, is squarely blocked by the language of subsection (c) that says – without qualification or limitation – that *nothing* within the right-of-way management authority is "affected" by the preemptive language in subsection (a).

This Court has always made it plain that a preemptive interpretation is not favored. *See, e.g., Building and Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993). Here there not only is no language supporting preemption of provisions within the scope of 253(c), but there is instead language that clearly negates preemption of such provisions.

Moreover, in the case of a potential conflict between a federal statute and a state statute, the inter-governmental doctrines applied by this Court require the state provision to be narrowly construed to avoid or to minimize preemption wherever possible. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). The court of appeals noted with approval the district court's limiting construction of two provisions requiring the franchisee to maintain records and to allow inspection. Pet. App. at 23a. But it did not itself apply that principle, presumably because it was considering the impact of the ordinance "as a whole."

An argument might be made for the court's analytical scheme if the question were limited to non-severable provisions.[23] But the court of appeals similarly did not pause

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[22] The opinion continues by "not[ing] that the district court applied this methodology and neither party objected." In its opening brief before the court of appeals, however, the City specifically noted that the non-fee provisions "do not even arguably prevent TCG from offering service under Section 253(a)." Initial Brief of Appellee/Cross-Appellant City of White Plains, filed July 19, 2001, at p. 46. The City thus objected to the procedure the court of appeals actually applied.

[23] The court of appeals did not disturb the district court's findings of severability, based on its reading of New York state law. Pet. App. at 44a, n.7.

to consider whether any of the provisions it struck down were severable, again presumably because it relied on them under its aggregative prohibition theory.

In sum, the court of appeals contravened the express intent of Congress by preempting individual provisions that were not shown to be prohibitory. This is an important question of federal law, because until it is resolved, the courts will not know how to properly analyze local ordinances, and local governments will not know the true scope of their authority.

II. In Holding that Section 253(c) Requires the City to Charge the Same Franchise Fees to Non-comparably Situated Carriers on a Going-Forward Basis, the Decision of the Court of Appeals Conflicts Directly with the Intent of Congress and a Decision of Another Circuit.

The court of appeals preempted the compensation provisions of the August Proposal because (1) the Ordinance as a whole violated subsection (a); Pet. App. at 15a, and (2) the compensation provisions discriminated in favor of Verizon, the incumbent provider, and so were not excepted under subsection (c). In so ruling, the court of appeals misconstrued both subsections. Furthermore, in finding White Plains's proposed five percent franchise fee to violate subsection (c), the court of appeals expressly declined to follow the contrary result in the Sixth Circuit's *Dearborn* case. Pet. App. at 21a. In *Dearborn*, the court upheld a franchise fee of four percent of gross revenues that applied to the CLEC but not the ILEC.[24] There is thus a clear split between the Second and Sixth Circuits on this issue.

The District Court found in the record "no basis to conclude that the fees sought would likely render doing

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[24] *Dearborn*, 206 F.3d at 624-25, *aff'g* 16 F. Supp. 2d 785 (E.D. Mich. 1999).

business with the City unprofitable." Pet. App. at 58a. In its review *de novo*, the court of appeals made no contrary finding of fact. Rather it found only that "the ordinance as a whole violates § 253(a)...." Pet. App. at 15a. That finding, in turn, was based on the court's own conclusion that the ordinance posed "obstacles ... to TCG's ability to compete ... on a fair basis...." *Id.* As discussed above, preemption of the entire Ordinance on this basis is not justified by the language and intent of Section 253(a). In addition, the court of appeals never made an independent finding that the August Proposal itself constituted a prohibition. For the reasons discussed at Point I.B., *supra*, the Second Circuit's application of Section 253 was thus incorrect and the court's analysis internally inconsistent.

The court seems to have presumed either that there is no difference between the historical positions and legal rights of Verizon and the plaintiffs, or that Section 253(c) demands that all past circumstances and factual distinctions be ignored.

In fact, the positions of Verizon and the plaintiffs are factually distinct and not comparable. The bargain that was struck between Verizon's predecessors and the City a century ago[25] contained a heavy universal service component. Part of the regulatory compact between the franchisor and the franchisee was the extension of service to previously unserved customers. Indeed, one of Congress's purposes in enacting the Communications Act was "to make available, so far as possible, to all the people of the United States ... a ...Nation-wide ... communication service...."[26] In return for access to the City's rights-of-way, the company

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[25] As alluded to in Part IV(B) of the court of appeals' opinion. Pet. App. at 20a, 23a.

[26] Section 1 (Purposes of the Act, Creation of Federal Communications Commission), 47 U.S.C. § 151. Section 254 (Universal Service), 47 U.S.C. § 254, added in 1996, elaborates on the principle recognized in Section 1.

undertook an obligation to extend telephone service to the taxpayers of the City. This regulatory compact entailed a large capital expenditure over many years.

Verizon to this day remains burdened by an obligation to serve. *See, e.g., In re MCI Telecomms. Corp.*, Case 98-C-0799, 1998 WL 1031962 (N.Y.P.S.C. Dec. 7, 1998). In contrast, the modern-day CLECs, such as plaintiffs, do not provide a universal service *quid pro quo*. They are under no commitment to make the kinds of investments to benefit the public interest that the ILECs did – nor do they have any continuing obligation to maintain an extensive residential network so that they can continue to provide such service.

Furthermore, Section 253(c) does not demand comparability between ILECs and CLECS. The language of the statute does not demand identical treatment, as the Second Circuit recognized. Pet. App. at 22a. But the court did not follow its own holding, because it ignored the value to the City of its current use of the 11 miles of conduit provided by Verizon at no charge. Merely because the value has not been determined does not mean the continuing right to use the conduit has no value. Even if Verizon's past expenditures were properly ignored, the court should have remanded the case for a valuation of the right to use the conduit.[27]

Nor does the language of subsection (c) preclude consideration of differences in other circumstances between ILECs and CLECs. In fact, the lack of comparability was specifically recognized in the course of the debate on the House floor that led to the rejection of the so-called "parity

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[27] The court of appeals noted that under the August Proposal the plaintiffs would also be required to provide conduit as if that disposed of the issue. Pet. App. at 23a. But the amount of free conduit requested was only nominal – merely 1000 feet – and therefore far less in value and cost than the 11 miles now provided by Verizon. *See* August Proposal, § 8.2 (Pet. App. at 4d).

amendment." By a vote of 338-86 the House voted to replace the "parity amendment" with the "Barton-Stupak amendment," which eventually became subsection (c). The opponents of strict parity specifically adverted to the different postures of the ILECs and CLECs. Congressman Stupak stated:

> Local governments must be able to distinguish between different telecommunications providers . . . . The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize the telecommunications companies . . . .

141 Cong. Rec. H8460 (daily ed. August 4, 1995). Congressman Barton stated a similar intent:

> [The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use that rights of way . . . . The Federal Government has no business telling State and local governments how to price access to their right-of-way.

141 Cong. Rec. H8460 (daily ed. August 4, 1995).

What is plainly apparent from the floor debate is that the intent of Section 253(c) was not to give the CLECs a "free ride" in the public rights-of-way.

By enacting Section 253 Congress did not intend to displace any existing franchises or similar rights of the ILECs. Yet what the court of appeals did here was to preemptively displace the existing regulatory compact between Verizon and the City on a going-forward basis by requiring a new *quid pro quo* other than that originally bargained-for by the parties, in different times under different circumstances.

III. The Courts' Facial Preemption of the Ordinance Provisions Allowing the City To Consider the Public Interest was Unnecessary, Premature, and in Conflict with Relevant Decisions of this Court.

The courts below preempted various provisions of the Ordinance that allowed the City to consider "public interest factors" or "the public interest" in reviewing applications and granting right-of-way franchises. The court of appeals noted that one such provision, § 2.7.01(vii) of the Ordinance, "clearly ha[d] the effect of prohibiting TCG from providing telecommunications service." Pet. App. at 15a; *cf.* Pet. App. at 48a.

> In particular, the provision that gives the Common Council the right to reject any application based on any "public interest factors ... that are deemed pertinent by the City" amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. *See* Ordinance, § 2.7-01(vii).

Pet. App. at 15a.[28]

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[28] The Ordinance actually refers to "public interest factors or considerations *that the city has a lawful right to consider* . . . ." (cont.)

In so doing, the court of appeals applied a standard of review akin to strict scrutiny, rather than deferring to the judgment of the non-federal legislative body. The Common Council of the City is entitled to deference because local enactments carry a strong presumption of validity. *McGowan v. Maryland*, 366 U.S. 420 (1961). Furthermore, this Court has held that "[t]here is no presumption that the power [of a local board] will be arbitrarily exercised . . . ." *People of the State of New York v. Van De Carr*, 199 U.S. 552, 562 (1905).

In addition, a public interest standard is not void for vagueness, and has been upheld by this Court. *New York Securities Corp. v. U.S.*, 287 U.S. 12, 24 (1932). Indeed, the Communications Act itself requires the Commission to act in accordance with the "public interest." *See, e.g.*, 47 U.S.C. §§ 252(e)(2)(A), 303; *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (public interest standard "'is as concrete as the complicated factors for judgment in such a field of delegated authority permit'") (citation omitted).

The court of appeals therefore had no basis in law for rejecting any provision of the Ordinance merely because it allows the City to consider the public interest. The "public interest" provisions could only be deemed invalid if actually applied in a manner contrary to law. Instead, the court presumed that White Plains would act contrary to law in every single circumstance, even though the City never even invoked any of the "public interest" provisions.

The courts below should have followed the jurisprudential principle that a legislative enactment is valid

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(continued) Ordinance § 2.7-01(vii) (emphasis added). Pet. App. at 10b. The limitation to factors that the City has "a lawful right to consider" would seem to remove any objection the court might have had. Why the court did not quote or discuss the full text is unclear. The remaining public interest provisions contained similar limitations. Ordinance, §§ 2.7-01(vi); 2.9-01(xvii) (Pet. App. at 10b, 13b).

if there is any situation in which it could properly be applied. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The contrary rule – that the legislative enactment is invalid if there is any situation in which it could not properly be applied – applies only in the limited context of regulation of speech. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The proper test in this situation is the former.

IV. The Preemption of Provisions Reserving Discretion To Approve a Transfer or Initial Grant of a Franchise Conflicts with Relevant Decisions of This Court, Because It Relies on an Interpretation of Section 253 That Needlessly Raises Constitutional Questions.

The court of appeals held that Section 2-9-01(xii) of the Ordinance and Section 14 of the August Proposal were preempted because of the "unfettered breadth of the provision[s] . . ." Pet. App. at 25a. These provisions govern transfers of a franchise. Pet. App. at 12b, 9d-13d. The court apparently also objected to Section 2.7-01(vii) of the Ordinance, discussed *supra* at II, for the same reason. In rejecting these provisions, the court of appeals adopted an interpretation of Section 253 that needlessly raises Constitutional issues. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The court's rationale seems to have been that these three provisions would allow the City to deny entrance to an applicant, either for an initial franchise or for the transfer of a franchise. Reserving the right to turn even a single person away, even for what might prove to be a perfectly valid reason, apparently constitutes a Section 253(a) "prohibition" in the eyes of the court of appeals. The opinion below thus can be read to mean that the City must allow any

telecommunications provider access to the rights-of-way on a purely ministerial basis, without the exercise of any discretion. Such a reading conflicts with the Sixth Circuit's holding in *Dearborn*, 206 F.3d at 624, rejecting the claim that a franchise requirement is a prohibition as mere "sophistry."

Such a reading would also violate at least three constitutional provisions. First, it exceeds Congressional power under the Commerce Clause. In *Printz v. United States*, 521 U.S. 898, 933 (1997), this Court held that Congress could not impose the burden of a federal regulatory program on the states. In this case, Congress has mandated that the City allow entry to multiple providers. Managing the rights-of-way is a much simpler task for the City when there is only one provider, however, so by directing the City to allow multiple entrants Congress imposed a significant new burden on the City in the name of federal policy. The First Circuit has held that Section 253 does not permit local governments to be "commandeered via § 253 to solve problems created by others." *Cablevision of Boston*, 184 F.3d at 105. It is therefore arguable that the new federal policy violated the principle of *Printz*, and that Section 253 itself is unconstitutional. But the more important point in this case is that the court of appeals went further, and read Section 253 as preventing the City from exercising any discretion at all over who uses its property. City officials are thus "put in the position of taking the blame for [the] burdensomeness and . . . defects [of the federal policy]" *Printz*, 521 U.S. at 930, without recourse or opportunity for redress.

The preemption of all local discretion regarding who may use the public rights-of-way also raises concerns under the Guaranty Clause.[29] The Guaranty Clause precludes the federal government from interfering with a state's

[29] The Guaranty Clause, U.S. CONST. art. IV, § 4.

distribution of state power among the various levels of government. The D.C. Circuit recognized this principle in the context of Section 253 in *City of Abilene v. FCC*, 164 F.3d 49, 52 (1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

Similarly, if Section 253 eliminates the City's discretion to decide who may occupy its rights-of-way, then Section 253 has taken the City's right to exclude, in violation of the Takings Clause of the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

There is no evidence that Congress meant to sweep so broadly, and Section 253 can be read more narrowly. By preempting the provisions in question, however, the court of appeals improperly raised all three issues.

Conclusion

The City's petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 10, 2003

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2001

(Argued: December 3, 2001 Decided: September 12, 2002)

Docket Nos. 01-7213(L) & 01-7255(XAP)

TCG NEW YORK, INC., TC SYSTEMS, INC. and TELEPORT COMMUNICATIONS d/b/a TCNY,

Plaintiffs-Appellants-Cross-Appellees,

-- v. --

CITY OF WHITE PLAINS,

Defendant-Appellee-Cross-Appellant.

Before:

WALKER, *Chief Judge*,
NEWMAN and F.I. PARKER, *Circuit Judges*.

Plaintiffs TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY brought an action against the City of White Plains alleging that White Plains's franchising ordinance and proposed franchise agreements violated § 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253, the Fourteenth Amendment, and state law. The District Court for the Southern District of New York (Barrington D. Parker, Jr., then-*District Judge*) decided the case on stipulated facts and held in part for TCG and in part for the City.

Affirmed in part and reversed in part.

PETER D. KEISLER, Sidley Austin Brown & Wood (Stephen B. Kinnaird, Sidley Austin Brown & Wood, Robert G. Scott, Jr., and T. Scott Thompson, Cole, Raywid & Braverman, Washington, DC, Mark C. Rosenblum, Stephen C. Garavito, and Teresa Marrero, AT&T Corp., Basking Ridge, NJ, on the brief), Washington, DC *for Plaintiffs-Appellants-Cross-Appellees.*

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ANDREW BRICK, Counsel, Albany, NY *for Amicus Curiae New York State Conference of Mayors and Municipal Officials in support of City of White Plains.*

WILLIAM MALONE, Miller & Van Eaton (Nicholas Miller and Matthew C. Ames, Miller & Van Eaton, Henry W. Underhill, General Counsel and Executive Director, and Lani L. Williams, Associate Counsel, International Municipal Lawyers Association, Washington, DC, Danielle DeMers, Office of the Town Attorney, Town of Colonie, Newtonville, NY, on the brief) Washington, DC *for Amici Curiae Local Governments in support of City of White Plains.*

JOHN M. WALKER, JR., *Chief Judge*:

Plaintiffs TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY (collectively, "TCG") brought an action against the City of White Plains

(the "City" or "White Plains") alleging that White Plains's franchising ordinance and proposed franchise agreements violated § 253 of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 253 ("§ 253"), the Fourteenth Amendment, and state law. The District Court for the Southern District of New York (Barrington D. Parker, Jr., then-*District Judge*) decided the case on stipulated facts and held in part for TCG and in part for the City. Both sides appealed. We affirm in part and reverse in part.

BACKGROUND

TCG, a provider of telephone and telecommunications services, is a group of wholly-owned subsidiaries of Teleport Communications Group, itself a wholly-owned subsidiary of AT&T Corporation. For purposes of this appeal, TCG can be treated as a unitary entity. In order to provide telecommunications services within White Plains, TCG sought the City's approval to construct telecommunications facilities and place other equipment within the City's public rights-of-way. In particular, TCG sought permission to build new conduits and to run a network of fiber optic cables through both these new conduits and preexisting ones in the City. Although TCG negotiated with the City starting in early 1992, the relevant negotiations are those that took place after December 1, 1997, when the Common Council of the City passed an ordinance providing a process by which telecommunications carriers could gain approval to place equipment in the City's rights-of-way. *See* White Plains Municipal Code, Telecommunications Franchising and Licensing, Articles 1-3 (the "Ordinance").

TCG filed an application for a revocable license in April 1998. Under the City's scheme, revocable licenses govern limited uses of rights-of-way for internal operations of a business, whereas franchises govern uses of rights-of-way on

a broader scale to sell or resell telecommunications services to residents of the City. *See* Ordinance, §§ 1-1-07, 1-1-12, 2-1-02, 2-1-06, and 2-1-07. In June 1998, the City's Corporation Counsel suggested that TCG apply for a franchise, rather than a revocable license, and provided TCG with a copy of a franchise agreement it had reached with one of TCG's competitors. After some negotiations over the terms of a franchise agreement, TCG submitted an application for a franchise in February 1999 and effectively discontinued pursuing a revocable license. In June 1999, TCG filed this lawsuit, alleging that White Plains's Ordinance and the proposed franchise agreement violated its rights under the TCA, the Fourteenth Amendment, and state law. In August 1999, White Plains made a new franchise agreement proposal (the "August Proposal"). This case concerns the validity of both the Ordinance and certain provisions in the August Proposal as amended.

Section 253 of the TCA provides, in relevant part:

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with [47 U.S.C. §254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority. Nothing in this section affects the authority of a State or local

> government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253.

The Ordinance forbids any telecommunications provider from using the rights-of-way of the City without obtaining a franchise or revocable license from the Common Council and that incorporates the requirements of the Ordinance. *See* Ordinance, §§ 2-1-01, 2-1-03. Applications for franchises are required to contain numerous disclosures. Some of these disclosures, which relate to basic management of the rights-of-way, are not disputed. *See* Ordinance, § 2-3-02(i), (iii), (iv), (v), and (viii).

Disclosures required by the Ordinance that are challenged in this action include a description of the telecommunications services that the franchisee seeks to provide; the proposed financing plans for constructing and operating the applicant's telecommunications system; and a description of the "legal, financial, technical and other appropriate qualifications of the applicant." *Id.* at (ii), (vi), and (vii). In addition to these disclosures, the Ordinance

requires that franchise agreements contain terms that specify what telecommunication services are to be offered, require the franchisee to maintain accurate records, and grant the City a right to inspect records and facilities. *See* Ordinance, § 2.9.01 (ii), (viii), and (vi).

The Ordinance also contains a variety of substantive requirements. Franchises may not be transferred without the prior consent of the City. *See id.* at (xii). Franchise agreements must contain any additional provisions the City deems "necessary or appropriate in furtherance of the public interest." *Id.* at (xvii). Similarly, before approving a franchise, the Common Council may consider the qualifications of an applicant, whether the franchise agreement "protect[s] the public interest," and "any other public interest factors." Ordinance, § 2-7-01(ii), (vi), and (vii).

TCG's attack is not confined to the Ordinance, but also challenges a number of the terms contained in the August Proposal. Of central importance to this appeal is a fee provision that requires TCG to pay five percent of its annual gross revenues from White Plains business to the City. *See* August Proposal, § 8.1(a). The fee provision also sets a minimum annual fee and requires TCG to provide White Plains with free conduit space for its own use if TCG constructs new conduits. *Id.* at §§ 8.1(b), 8.2. White Plains also included in its August Proposal a "most favored vendee" clause, whereby TCG is required to offer services to the City on terms that are at least as good as the terms TCG offers to any other governmental or non-profit customer in Westchester County. *Id.* at § 2.7. To ensure that franchise fees would be paid, White Plains also included provisions requiring a secondary guaranty from AT&T, TCG's corporate parent, to pay any fees that TCG defaults on and requiring TCG to maintain financial records at a fixed

location available for the City's inspection. *Id.* at §§ 16, 12.1, 12.2 and 8.5.

Beyond the foregoing financial provisions, the August Proposal precludes TCG from transferring the franchise or ownership of more than twenty percent of TCG without prior consent from White Plains, implementing § 2-9-01(xii) of the Ordinance. *See* August Proposal, § 14. The August Proposal also requires TCG to seek prior City approval for installations of any part of the network within its boundaries, including installations that are exclusively on private property. *Id.* at §§ 11.9(d) and 12.3. Finally, the City insisted on provisions that waive TCG's right to challenge provisions of the August Proposal or the Ordinance in court. *Id.* at §§ 3.1(4) and 13.6.

Although the City has entered into franchise agreements pursuant to the Ordinance with some telecommunications providers, it has not required any formal franchise agreement from the incumbent provider, Verizon, formerly known as Bell Atlantic, NYNEX, and New York Telephone. Moreover, Verizon is not required to pay any franchise fee. While Verizon and its predecessors have provided the City with free conduit space since 1919, the value of the free conduit space has never been estimated.

TCG argued before the district court that the Ordinance and the August Proposal violated § 253 because 1) they "prohibit or have the effect of prohibiting" TCG's ability to provide telecommunications services;2)they amount to prohibited regulation that go beyond management of the public rights-of-way; and 3) they require TCG to pay compensation that is neither "fair and reasonable" nor sought "on a competitively neutral and nondiscriminatory basis." Additional claims advanced by TCG under the Constitution

and state law were rejected by the district court and are not appealed.

Applying § 253 of the TCA, the district court found that the Ordinance had the effect of prohibiting TCG from providing telecommunications services. However, it concluded that portions of the Ordinance and August Proposal were saved by § 253(c), the statute's savings clause, including the licensing fee. The district court also concluded that substantial portions of the Ordinance and the August Proposal were invalid because they were not confined to managing the public rights-of-way, but rather impermissibly regulated telecommunications. Both sides appealed.

DISCUSSION

I. Jurisdiction

The first matter that needs to be considered is whether this court has jurisdiction to resolve TCG's claims. One circuit court has held, in the context of TCA litigation, that if no private cause of action is created by a statute, the federal courts lack subject matter jurisdiction. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622-24 (6th Cir. 2000) (holding that, because the existence of a cause of action goes to subject matter jurisdiction, courts must determine whether an implied cause of action is created sua sponte, and then concluding that § 253 does imply a private cause of action). White Plains does not argue that there is no private cause of action, but if the issue were jurisdictional, we would have to determine it nonetheless. The Sixth Circuit's reliance on *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986), is misguided. *Merrell Dow* addressed the issue of whether federal question jurisdiction exists when a plaintiff brings a state cause of action that depends on a federal statute that

does not create a private cause of action. *Id.* at 808-19. It did not reach the question of whether the existence of a federal cause of action is jurisdictional. However, the Supreme Court has since squarely decided the issue, holding that "[t]he question whether a federal statute creates a claim for relief is not jurisdictional." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994). Accordingly, since White Plains does not argue that there is no private cause of action, we need not reach the issue.

We must also consider whether the action should be dismissed under the doctrine of primary jurisdiction. Primary jurisdiction is a judge-made doctrine intended to promote proper relationships between the courts and administrative agencies. *Johnson v. Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir. 1992). The doctrine serves two principal interests: "consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). We have also cited judicial economy as an interest that the primary jurisdiction doctrine can serve. *Johnson*, 964 F.2d at 123.

As a preliminary matter, we note that the Federal Communications Commission ("FCC") filed an amicus brief in this case and, at our request, provided supplemental briefing on both the issue of where jurisdiction to decide this case lies and on the substantive issues to be determined. The FCC did not definitively state an opinion on whether it has concurrent jurisdiction with the district courts over § 253, but it did outline several reasons to think that jurisdiction should be concurrent. For example, the FCC noted that § 253 does not use language, included elsewhere in the TCA, that confers exclusive jurisdiction in the Commission. *See,*

e.g., 47 U.S.C. § 255(f). The absence of such language does not foreclose primary jurisdiction, however, because primary jurisdiction goes to the issue of when, not whether, courts should consider issues. But it does counsel against a conclusion that the FCC should decide these issues first.

Amicus briefs from an agency can serve much of the interest in consistency and uniformity of law that underlies the doctrine of primary jurisdiction, while avoiding some of the delay that sometimes results from dismissing on the ground of primary jurisdiction. *See* 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.6, 304 (3d ed. 1994). On the substantive issues, the FCC expressed opinions as to some issues but declined to make definitive statements on others, such as the questions of whether a gross revenue fee could be "fair and reasonable compensation," compensation should be limited to a local government's costs, or some other formula is appropriate. While the FCC's response was not exhaustive, it was informative on some issues.

In considering primary jurisdiction, we think it is significant that the parties in this case stipulated to the facts. Although we acknowledge that an agency's role in "marshaling [the facts] into a meaningful pattern", *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), does cover some cases where the underlying facts are not in dispute, we also believe that where the facts are undisputed, it will rarely be appropriate to dismiss on the basis of primary jurisdiction. In addition, disputes over whether a local ordinance violates § 253 will often be factually straightforward. The difficult questions in this area are normally the legal questions, which means that the important concern for determining issues of primary jurisdiction is "consistency and uniformity in . . . regulation." Considering the "relatively narrow scope of the doctrine of primary jurisdiction," *Goya Foods, Inc. v. Trop-*

icana Prods., 846 F.2d 848, 851 (2d Cir. 1988), the fact that all of the issues here are questions of law, and having received the FCC's views on some of the issues, we decline to dismiss on the basis of primary jurisdiction.

II. Standard of Review

Because, as we have noted, the parties stipulated to all facts, the district court's conclusions are exclusively conclusions of law that are reviewed *de novo*. *See, e.g., Gen. Elec. Co. v. Comm'r*, 245 F.3d 149, 154 (2d Cir. 2001). The parties disagree over whether the court should defer to the judgments of the FCC under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). TCG, supported by the federal government's amicus brief, argues that deference is required because the FCC has authority to administer the entirety of Chapter 5 of Title 47 (the Wire or Radio Communications chapter), except as specific provisions of the chapter provide. *See* 47 U.S.C. § 151 ("there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

White Plains primarily argues that deference is inappropriate because § 253(d), by omitting reference to § 253(c), removed disputes involving § 253(c) from the FCC's jurisdiction. § 253(d) provides that:

> [i]f, after notice and an opportunity for public comment, the [FCC] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this

> section, the [FCC] shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d).

White Plains argues that the legislative history of subsection (d) establishes that it was intended to deprive the FCC of jurisdiction over issues involving the interpretation of subsection (c). A prior version of subsection (d) that required the FCC to preempt any local provisions that violated § 253 was defeated and replaced by the current provision. Several circumstances, however, make it difficult to accept White Plains's argument. First, White Plains argues elsewhere that subsection (c) is a savings clause that creates no independent restrictions but rather permits certain restrictions that would otherwise have been prohibited by subsection (a). Although this argument is not necessarily inconsistent with White Plains's jurisdictional argument, the plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption. Second, the provisions of § 253(d) are mandatory: the FCC "shall preempt" local statutes to remedy violations of § 253(a) or (b). In light of the FCC's general regulatory authority, the inclusion of a mandatory regulatory role does not logically foreclose FCC action in the areas where it is not mandatory. Third, because § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint. It is true that the well-pleaded complaint rule is a matter of statutory construction, not a constitutional requirement for

jurisdiction. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Thus, Congress could choose to apply a different rule under some circumstances, and indeed courts have recognized some exceptions. *See, e.g., Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (describing ERISA preemption as so complete that a complaint raising only state-law claims is necessarily federal in nature because of the preemption defense and so may be removed). However, we will not assume that Congress made such a choice here without stronger evidence.

Although the language of §253(d) supports the conclusion that cases such as this one should not be dismissed under the doctrine of primary jurisdiction, it does not support the conclusion that no deference is owed to the FCC. Consequently, the FCC's decisions interpreting the scope of § 253(c) merit some deference. *See Olmstead v. Zirming*, 527 U.S. 581, 598 (1999) (agency views entitled to be consulted for helpful guidance even if not *Chevron* deference); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (agency guideline, not subject to rigors of Administrative Procedure Act, entitled to "some deference").

White Plains also argues that under *Chevron*, the statute is sufficiently clear that there is no basis for deference and that the relevant FCC decisions do not control this case. *See Chevron*, 467 U.S. at 842-43. Although we do not reach the issue of whether the statute is sufficiently clear to eliminate the need for deference, we agree that the relevant FCC decisions are not controlling.

III. Whether White Plains is Prohibiting or Effectively Prohibiting Telecommunications Services

Section 253(a) specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, may

prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253(a). Courts have held that a prohibition does not need to be complete or "insurmountable" to run afoul of § 253(a). *See, e.g., RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). Additionally, the FCC has stated that, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it "consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 1997 WL 400726, at ¶ 31 (1997). We agree with these precedents.

Certain portions of White Plains's Ordinance clearly have the effect of prohibiting TCG from providing telecommunications service. In particular, the provision that gives the Common Council the right to reject any application based on any "public interest factors . . . that are deemed pertinent by the City" amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. *See* Ordinance, § 2.7-01(vii). Similarly, the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays. In light of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains on a fair basis, we conclude that the Ordinance violates § 253(a).

While we conclude that the Ordinance as a whole violates § 253(a), we must nevertheless analyze whether portions of the Ordinance and of the August Proposal are saved by §253(c). This analysis is required because applying § 253(c) to the Ordinance as a whole without considering

individual provisions could result in an improper infringement of the City's legitimate interests in regulating the uses of the public rights-of-way. Conversely, applying § 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions. We note that the district court applied this methodology and neither party objected.

IV. The August Proposal's Gross Revenue Fee

The most significant provision of the August Proposal is the requirement that TCG pay five percent of its annual gross revenues from White Plains business to the City. *See* August Proposal, § 8-1(a). Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). In order for the fee to fall within this savings clause, the fee must constitute "fair and reasonable compensation" and must be applied "on a nondiscriminatory basis." We consider these issues separately with respect to the five-percent gross revenue fee White Plains is charging TCG.

A. "Fair and reasonable compensation"

The statute does not define the scope of "fair and reasonable compensation." The core issue is whether to be "fair

and reasonable" such "compensation" is limited to cost recovery, as TCG argues, or whether it also extends to a reasonable rent, as White Plains contends.

The statutory language is not dispositive. As ordinarily understood, "compensation" often extends to more than costs. Thus, when we discuss wages and salary as "compensation," *see, e.g.*, I.R.C. § 61(a)(1), the term is not limited to costs. Similarly, discussing the payment of rent as "compensation" for the use of property does not strain the ordinary meanings of any of the words. And commercial rental agreements commonly use gross revenue fees as part of the price term. However, "compensation" is also sometimes used as a synonym for costs. As an example, "compensatory" damages in tort are designed to precisely offset the costs, both financial and otherwise, inflicted by the tort. Terms like compensation are flexible, taking on different meanings depending on the contexts in which they are used. Even "costs," a seemingly more concrete term that TCG argues is synonymous with "compensation" in this context, can refer either to the actual out-of-pocket expenses incurred or more broadly to the costs of capital and the "opportunity cost" of forgone alternative uses of resources. *See Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1666 n.17 (2002). Thus, although Congress's choice of the term "compensation" may suggest that gross revenue fees are permissible, this hardly decides the issue.

The two other circuits that have addressed the question have split. The Sixth Circuit has upheld a four-percent gross revenue fee. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000). The court employed a "totality of the circumstances" examination and concluded that the fee was "fair and reasonable" in light of the amount of use contemplated, the amount other providers were willing to pay, and the fact that TCG had agreed in prior negotiations

to an almost identical fee. *Id.* at 625. The court also noted that § 253's "fair and reasonable" compensation requirement is different from the Pole Attachment Act's requirement that rates be "just and reasonable", 47 U.S.C. § 224, which is defined in terms of recovery of additional costs, and that "compensation" is different from costs. *Id.* at 625.

Conversely, the Ninth Circuit declared in passing that "non-cost-based fees" are "objectionable," but only after concluding that other, non-severable aspects of the local ordinances at issue required preemption. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 309 (2002). Thus, the Ninth Circuit's statement about "non-cost-based fees" could be described as dicta.

TCG premises its argument that "fair and reasonable compensation" should be limited to costs and should exclude gross revenue fees on a collection of since-repudiated dormant Commerce Clause cases. *See, e.g., Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160,162 (1903). TCG argues that in those cases the Supreme Court described reasonable compensation as limited to the recovery of costs, and that, despite the subsequent overruling of that line of cases, Congress should be assumed to have intended the same meaning of "reasonable." The dormant Commerce Clause cases at issue, which dealt with restrictions on the ability of states to tax interstate commerce, were overruled in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274,277, 288-89 (1977). TCG relies on *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), for the principle that Commerce Clause precedent that has been overruled nevertheless can be used to determine whether a fee is reasonable. *Northwest Airlines* concerned the Anti-Head Tax Act, 49 U.S.C. App. §1513, which forbids certain taxes in the operation of airports, but allows "reasonable rental

charges, landing fees, and other service charges." 49 U.S.C. § 4011b(e) (formerly 49 U.S.C. App. §1513(b)); *see Northwest Airlines*, 510 U.S. at 363. In construing "reasonable rental charges," the Supreme Court relied on superseded dormant Commerce Clause precedent concerning what airport fees were reasonable. *Id.* at 367-69. However, the circumstances of *Northwest Airlines* were dramatically different from the present case. *Northwest Airlines* interpreted the statute, which had been enacted to displace prior caselaw, *see id.* at 368, in light of the way that terms were used in the caselaw it displaced. In contrast, TCG asks this court to interpret the 1996 Act in light of the way terms were used in a series of unrelated cases that were overruled by the Supreme Court in 1977. Expecting Congress to be aware of how courts interpreted words in an area of law at the time that a statute was enacted to modify that law is different from assuming that Congress intended words to be interpreted in the same way they were interpreted in unrelated caselaw that had become obsolete nearly twenty years earlier.

Additionally, the policies underlying § 253(c)'s safe harbor for "fair and reasonable compensation" are significantly different from the reasons that the dormant Commerce Clause was held to restrict fees to reasonable, cost-based exactions. Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates. In contrast, the dormant Commerce Clause cases relied on by TCG required that rates be reasonable to ensure that they were not disguised taxes. Section 253 is not targeted at disguised taxes.

However, because the issues of whether "reasonable compensation" can include gross revenue fees and, if so, what percentage of gross revenue may be exacted are difficult and not necessary to resolve this appeal in light of the discussion which follows, we decline to reach the issue.

B. "Competitively neutral and nondiscriminatory"

White Plains does not require Verizon to comply with the terms of the Ordinance and has not required Verizon to enter into a franchise agreement comparable to the August Proposal. The City argues, and the district court agreed, that the differential treatment is "competitively neutral and nondiscriminatory," as § 253(c) requires, because of the long history of services provided to White Plains by Verizon and because Verizon provides certain in-kind compensations to the City such as free conduit space. We disagree.

Contrary to the district court's holding, the disparate treatment is plainly not "competitively neutral and nondiscriminatory." From an economics perspective, whether fees are competitively neutral should be determined based on future costs of providing services, not sunk costs incurred in the past, because that is the playing field on which the competition will take place. *Cf. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1653-54 (2002) (upholding FCC regulation linking "just and reasonable" rates only to forward-looking costs). Verizon's costs in providing conduits to White Plains are sunk costs; they do not affect the cost to Verizon of offering services in the future. Furthermore, Verizon was compensated for those sunk costs by receiving a monopoly on phone service within White Plains under the old system and would normally be expected to have included those costs in its rate base. If TCG is required to pay five percent of its gross revenues to the City and Verizon is not, competitive neutrality is

undermined. Verizon will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the TCA. *See* Preamble, 104 P.L. 104, 110 Stat. 56.

The Sixth Circuit reached a different conclusion in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000). The *TCG Detroit* situation is not precisely analogous to the White Plains plan, however, because there the City of Dearborn attempted to require Ameritech, the incumbent service provider, to pay the same fee that it charged TCG. The attempt to charge Ameritech a franchise fee was invalidated on Michigan state law grounds. *Id.* at 625-26. In contrast, here White Plains has not attempted to charge Verizon the fee that it seeks to charge TCG. Thus, to the extent that *TCG Detroit* turned on Dearborn's attempts to treat both service providers equivalently, it is simply not applicable to this case. But because the Sixth Circuit allowed Dearborn to give the advantage to the incumbent after those attempts failed, we think *TCG Detroit* was wrongly decided.

The Sixth Circuit concluded that because Dearborn sought to treat TCG and Ameritech equally but was precluded from doing so by state law, it did not violate the provisions of § 253. However, § 253 does not limit municipalities to charging fees that are "competitively neutral" to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent. Where state laws and local ordinances combine to create a fee that is not "competitively neutral," § 253 preempts the local ordinance, even if it would have been permissible absent the state law. Moreover, the Sixth Circuit's statement that TCG failed to show that

Ameritech was undercutting its competitors and creating a barrier to entry misses the point that fees that exempt one competitor are inherently not "competitively neutral," regardless of how that competitor uses its resulting market advantage.

The requirements of § 253 are not inflexible, however. The statute does not require precise parity of treatment. An earlier draft of the bill that ultimately became § 253 included a provision that would have forbidden local governments from imposing any fee that "distinguishes between or among providers of telecommunications services." H.R. 1555, 104th Cong. § 243(e) (1995). Both the elimination of that provision and the language of the enacted version of § 253 strongly support the conclusion that franchise fees need not be equal. Municipalities can take into account different costs incurred by different uses of the rights-of-way. They can also consider the scale of the use of rights-of-way. They also retain the flexibility to adopt mutually beneficial agreements for in-kind compensation. Neutrally applied most-favored-vendee provisions that require service providers to offer their best rates to the city or requirements that service providers allow the city free use of conduit space or similar treatment are at least potentially permissible. A city can negotiate different agreements with different service providers; thus, a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided the effect is a rough parity between competitors.

But a municipality may not, as White Plains sought to do, impose a host of compensatory provisions on one service provider without placing any on another. The City tried to exact a variety of forms of compensation from TCG, while not exacting any compensation from Verizon on a forward-

looking basis. The only compensation that Verizon has provided White Plains was the use of free conduit space, provided in the past in exchange for a complete monopoly at that time. Verizon has already reaped the benefit of those bargains. Moreover, TCG is required to provide the city with conduit space in conduits it builds. In order for the City to demand fees, most-favored-vendee status, or similar benefits from TCG, it must demand comparable benefits from Verizon, taking into account relevant differences in scale of operations and costs incurred. While municipalities may be flexible, the compensation they exact must be "competitively neutral and nondiscriminatory."

We thus hold that the five-percent gross revenue fee provisions of the August Proposal, at sections 8.1-8.4, 8.6, are not saved by § 253(c) and reverse the district court. The provisions intended to ensure payment of the fee, most notably sections 8.5 and 16 of the August Proposal, which required that financial records be available for examination and that TCG's parent guarantee payment, are rendered moot by the invalidation of the fee itself.

We affirm the district court's invalidation of the most-favored-vendee clause. *See* August Proposal, § 2.7. Although we take no position on whether section 2.7 should be construed as impermissible rate regulation, as the district court concluded, or as a form of compensation for use of the rights-of-way, in which case it is not competitively neutral because Verizon is not required to provide any compensation to the City, we conclude that the provision violates § 253.

V. Non-fee Related Provisions

We next turn to the aspects of the City's plan that do not involve fees. Here, the question is whether the regulations are designed to "manage the public rights-of-way," as

permitted by § 253(c), or impermissibly go further. § 253(c). We first consider the portions of the Ordinance invalidated by the district court. Two provisions that required TCG to maintain records and to allow the City to inspect its records and facilities were narrowed by the district court to apply only to the extent necessary to manage the rights-of-way. *See* Ordinance, §§ 2-9-01(vi) and (viii). White Plains does not appeal the limiting construction placed on these provisions.

The district court struck down a variety of provisions in the Ordinance as not directly related to the management of the rights-of-way. Thus, the district court invalidated subsections 2-3-02(ii), (vi), and (vii) of the Ordinance, which required disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise. Similarly, the district court struck down subsections 2-7-01(ii) and 2-9-01(ii), both of which required consideration of the information required by subections 2-3-02(ii), (vi), and (vii). Subsections 2-7-01(vi), (vii), and 2-9-01(xvii) were invalidated for allowing and requiring the White Plains Common Council to consider other factors related to the public interest in deciding whether to grant a franchise.

All of the Ordinance sections struck by the district court were properly invalidated. The disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 does not permit White Plains to do, not for regulating use of the rights-of-way, which White Plains may do. *See City of Auburn*, 260 F.3d at 1177-78. Because the required information was not relevant to the permissible franchising process, subsections 2-7-01(ii) and 2-9-01(ii) likewise fall. Finally, the Ordinance's provisions allowing the White Plains Common Council to

consider any factor deemed to be in the public interest provides precisely the sort of discretion to prohibit telecommunications services that § 253 preempts. *See City of Auburn*, 260 F.3d at 1179.

The district court's invalidation of various portions of the August Proposal was similarly correct. Sections 11.9(d) and 12.3 require prior approval of the locations of TCG's network. Although a similar requirement might be permissible if it were limited to public land, the sections as written restrict TCG's ability to develop a network even on private property and are, therefore, invalid. The district court also invalidated the record-keeping provisions of Sections 12.1 and 12.2; White Plains does not challenge this decision of the district court.

The district court also correctly invalidated sections 3.1(4) and 13.6 of the August Proposal, both of which purport to waive TCG's right to challenge illegal provisions of the franchise in court. Requiring telecommunications providers to agree to not challenge the provisions of the franchise in court is a transparent attempt to circumvent § 253. The TCA does not create a collection of default rules that municipalities and service providers can contract around. The provision would have been completely unenforceable had TCG agreed to it, but it was improper for White Plains to even propose it.

Finally, we turn to the restrictions the Ordinance and August Proposal place on transferring a franchise. *See* Ordinance, §2-9-01(xii); August Proposal, §14. The district court upheld the Ordinance's provision and by extension the August Proposal's implementation of this restriction, but we reverse. The Ninth Circuit has invalidated similar provisions, holding that they went "far beyond" regulating the use of rights-of-way. *City of Auburn*, 260 F.3d 1160,

1178 and n.15. A more limited franchise transfer provision could be reasonably related to regulating the use of the rights-of-way. For example, a transfer limitation, if applied neutrally to all franchisees, might permit rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed fees for use of rights-of-way. However, because White Plains cannot legitimately turn away "any" provider of telecommunications services, § 253(a), a provision of sweeping breadth whose main purpose is to force each new telecommunications provider to receive White Plains's blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee, is invalid. Because of the unfettered breadth of the provision, it cannot stand.

To summarize, we invalidate as contrary to § 253(a) and not saved by § 253(c) the following provisions of the Ordinance: Sections 2-3-02(ii), (vi), and (vii), 2-7-01(ii), (vi), (vii), and 2-9-01(ii), (xii), and (xvii) and August Proposal Sections 2.7, 3.1(4), 8, 11.9(d), 12.1, 12.2, 12.3, 13.6, and 14. August Proposal Section 16 is rendered moot by the invalidation of the five-percent gross revenue fee.

CONCLUSION

We affirm in part and reverse in part. Costs are awarded to TCG.

United States District Court,
S.D. New York.

TCG NEW YORK, INC., TC Systems, Inc.,
and Teleport Communications d/b/a
TCNY, Plaintiffs,
v.
CITY OF WHITE PLAINS,
NEW YORK, Defendant.

No. 99CIV.4419(BDP).

Dec. 20, 2000.

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, Jr., District Judge.

Plaintiffs TCG New York, Inc., TC Systems, Inc. and Teleport Communications d/b/a TCNY (collectively, "TCG" or "Plaintiffs") commenced this action against the City of White Plains (the "City" or "Defendant"), alleging violations of § 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253 (the "TCA"), the Fourteenth Amendment of the United States Constitution and New York state law. The case was tried to the Court on a statement of stipulated facts (the "Stipulated Facts"). This Court's decision, based on those facts, follows.

BACKGROUND

Plaintiffs are all wholly-owned subsidiaries of Teleport Communications Group, a subsidiary of AT & T Corporation, and are in the business of providing telephone and telecommunications services. Plaintiff TC Systems, Inc.

is organized to construct, own, use and maintain lines for telephone purposes within the State of New York under the New York Transportation Corporations Law. *See* N.Y. Transp. Corp. Law § § 2, 25. Plaintiffs have been issued certificates of public convenience and necessity by the New York Public Service Commission ("PSC") for the provision of public telephone service in the State of New York. *See* N.Y. Pub. Serv. Law § 99.

The City is a municipal corporation and a political subdivision of the State of New York. Plaintiffs have sought the City's approval to construct telecommunications facilities and place other equipment in the City's rights- of-way, in particular new conduit networks as well as a fiber optic network of cables to run through new and preexisting conduits in the City.

I. The City Ordinance

On December 1, 1997, in response to Congress' enactment of the TCA in 1996, the City passed an ordinance setting forth the process by which new telecommunications carriers could obtain approval to place equipment in the City's rights-of-way (the "Ordinance"). *See* White Plains Municipal Code, Telecommunications Franchising and Licensing, Articles 1--3.

The Ordinance requires that a carrier submit a formal application to the Commissioner of Public Works and the Office of Corporation Counsel which must include, *inter alia,* information regarding the carrier, its affiliates, the equipment to be placed in the rights-of-way, the carrier's construction plans, its legal, financial, technical and other appropriate qualifications, and the financing for the proposed construction. *See* Ordinance § § 2-3-01 & 02.

After the application is complete, the Ordinance requires that the carrier obtain a "franchise," or, in the case of carriers seeking only a limited use of the rights-of-way (e.g., installing less than 2500 feet of cable), a "revocable license." *See* Ordinance § 2-1. The parties are required to negotiate the terms of the franchise agreement or the revocable license, including compensation to the City, insurance, performance bonds, the City's right to inspect the premises, indemnification requirements, non-assignment clauses and other provisions. *See* Ordinance § § 2-6, 2-9.

Once the carrier and City reach an agreement, the application is referred to the Common Council, which may reject the application or adopt it by a separate ordinance. *See* Ordinance § 2-1-04. In its review, the Common Council may consider a number of factors, including, *inter alia,* the carrier's ability to satisfy construction requirements and to maintain the City in good condition, the adequacy of the terms of the franchise agreement or license, the adequacy of the compensation to the City, legal, financial, technical and other qualifications of the carrier and any other factors as Council deems appropriate and in the public interest of the City. *See* Ordinance § 2-7.

II. Negotiation of the Franchise Agreement

The parties have had numerous discussions since early 1992 regarding the possible use of the City's rights-of-way in connection with TCG's plan to construct telecommunications facilities. TCG formally applied in 1992 and 1994, regularly communicating with City representatives in an attempt to obtain the City's consent.[1]

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[1] To date, no decision has been rendered by the City concerning the 1992 and 1994 applications, as they are presumably considered moot by the actions that followed.

In April 1998--following the enactment of the Ordinance--TCG filed a formal application with the City for a revocable licence to install a relatively small amount of fiber optic cable and about 240 feet of underground conduit. Soon thereafter, TCG requested a full-blown franchise,and made a formal application for a franchise in February 1999.

Since TCG's request, the parties have engaged in vigorous negotiations, particularly over a May 1999 draft of the proposed franchise agreement, the terms of which were substantially based upon a "Model Franchise" which the City seeks to impose on all prospective telecommunications providers.[2] When it was clear that agreement could not be reached on the terms of that proposal, TCG filed this lawsuit on June 18, 1999, alleging violations of federal, state and constitutional law.

After the initiation of this lawsuit, the parties attempted to resolve their differences, and their negotiations resulted in an offer by the City of a new proposed franchise agreement (the "August Proposal") which sought to address some, but not all, of TCG's objections. As a result of further negotiations, the City offered additional modifications to the August Proposal, which were not sufficient to satisfy TCG.[3]

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[2] The City has previously come to terms with Brooks Fiber (a subsidiary of MCI Worldcom, Inc.), Northeast Networks, Inc. and Metromedia Fiber Network Services, Inc., who have each agreed to essentially the same terms in the Model Franchise, as well as Qwest Communications Corp. and Northeast Optice Network, Inc., who have been granted revocable licenses.

[3] There appears to be some confusion between the parties concerning the latest version of the franchise agreement.

The City's August Proposal would, *inter alia*, require TCG to pay an annual franchise fee to the City equal to five percent of gross revenues, require a guarantee of payment from its parent corporation, and would require that TCG build a limited amount of additional conduit without charge at the City's request. In addition, the August Proposal would reserve the right of the City to examine TCG's records, impose a most favored vendees status on behalf of the City, and mandate that upon termination of the agreement, TCG would be required to remove its facilities from public property at its own expense.

III. Treatment of Bell Atlantic

The current incumbent local exchange telephone

While plaintiffs refer in their trial papers only to the provisions of the May 4th proposal, both parties have acknowledged--in the Stipulated Facts--that the August Proposal was, indeed, delivered to and received by TCG in the summer of 1999. The August Proposal, as well as subsequent modifications made thereto, renders some of the provisions TCG complains of moot, including, *inter alia*, the "most favored nations" clause (§ 2.2 in the May draft), the requirement that title to TCG's facilities pass to the City upon termination of the franchise (§ § 4.3, 4.5 and 4.6 in the May draft), the requirement that TCG pay a fee if it wishes to transfer the franchise (§ 15.2 in the May draft), the requirement that TCG submit annual financial reports and other reports (§ § 9.5, 13.4--13.6 in the May draft) and the provision stating that TCG would comply with the agreement and pay the franchise fee even if it were deemed illegal (§ 9.1(b) in the May draft). For purposes of this opinion, the Court assumes that the August Proposal, including its modifications, is the relevant version in dispute.

carrier in the City is Bell Atlantic (and its predecessors-in-interest, NYNEX and New York Telephone). The City has had arrangements and understandings with Bell Atlantic since as far back as 1919, at which time Bell Atlantic agreed to provide the City with free conduit for certain municipal uses. Throughout the years, a symbiotic relationship existed between Bell Atlantic and the City, whereby Bell Atlantic would provide free conduit space in exchange for permission to use the City's public rights-of-way. Since 1954, Bell Atlantic has constructed an extensive underground conduit network in the downtown area of the City, which is more extensive than the underground facilities constructed by, or proposed to be constructed by, any other telecommunications provider in the City, including TCG. Of the thirty-one mile network of fiber optic cable and copper wire that make up the City's own network, twenty miles are in conduit owned by the City on aerial poles owned by Bell Atlantic and ConEd. The other eleven miles are run through underground conduit provided by Bell Atlantic at no cost to the City.

Consequently, Bell Atlantic is not subject to the regulations set forth in the Ordinance, and is not required to obtain, and does not have, a franchise agreement with the City. Unlike new providers of telecommunications services in the City, Bell Atlantic does not pay a franchise fee, is not subject to the same general construction permitting requirements, and is free from requirements for insurance, deposits and permitting fees.

IV. TCG's Claims

TCG objects to the requirements that the City seeks to impose on several grounds. First, plaintiffs claim that provisions of the Ordinance and the August Proposal effectively prohibit TCG from providing telecommunications services, and regulate beyond the City's public rights-of-way,

violating § 253(a), (b) and (c) of the TCA (Claims 1--4, 6--8, 11 and 12 of the Complaint). Second, TCG complains that Bell Atlantic's *de facto* exemption from the Ordinance, and from having to enter into a franchise agreement, is both non-competitive and discriminatory against TCG, in violation of § 253(c) of the TCA (Claim 5). Third, TCG claims that the Ordinance and the August Proposal violate the New York Transportation Corporations Law and the New York Public Service Law (Claims 9--12). Finally, TCG contends that the City has denied plaintiffs' due process rights under the Fourteenth Amendment (Claim 13).

DISCUSSION

I. The Telecommunications Act of 1996

The gravamen of plaintiffs' complaint is that the City's regulations set forth in the Ordinance and the August Proposal are preempted under § 253 of the TCA. Accordingly, a brief look at the history and structure of the TCA is helpful.

By adopting the TCA in 1996, Congress "fundamentally restructure[d] local telephone markets" by prohibiting states and local governments from "enforc [ing] laws that impede competition." *AT & T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). For nearly a century, the rationale behind the regulation of the telecommunications industry presumed that telephone monopolies would best provide reliable and universal service. *See Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston,* 184 F.3d 88, 97 (1st Cir.1999). The promulgation of the TCA, however, signaled the abandonment of that regulatory philosophy, as the federal statute now "requires [incumbent carriers] to provide other participants in the

telecommunications market with competitive access to their networks and services." *Id.* As a result, competitive local exchange carriers, or CLECs, may now offer service in competition with incumbent local exchange carriers, or ILECs. *See Id.* at 271-73.

At the heart of the present dispute is the meaning and structure of § 253 of the TCA. That section, entitled "Removal of Barriers to Entry," states, in relevant part:

> (a) In general--No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
> (b) State regulatory authority--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
> (c) State and local government authority--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The structure and language of § 253 embodies the balance between Congress' "new free market vision" and its recognition of the "continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety." *Cablevision,* 184 F.3d at 98. Under § 253(a), state or local

regulations may not prohibit or have the effect of prohibiting telecommunications services--if so, then the relevant regulations are preempted by that provision, unless they can come under the safe harbors set forth in § 253(b) or (c). *See Cablevision,* 184 F.3d at 98 (calling § 253(b) and (c) "safe harbors" to the prohibition of § 253(a)); *Sprint Spectrum L.P. v. Mills,* 65 F.Supp.2d 148, 159 (S.D.N.Y.1999) ("Section 253 preempts all state and local regulations that prohibit or have the effect of prohibiting any company's ability to provide telecommunications services, unless such regulations fall within either of the statute's two "safe harbor" provisions.") (internal quotations and citations omitted); *AT & T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 587 (N.D.Tex.1998) (same).

§ 253(b) preserves the ability of a state to regulate telecommunications on the basis of the "public good." "Requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" are permissible so long as they are imposed on a competitively neutral basis. 47 U.S.C. § 253(b). Conjointly, § 253(c) reserves the authority of state and local governments to regulate the public rights-of-way, as well as their right to charge "fair and reasonable compensation," so long as they are conducted on a competitively neutral and nondiscriminatory basis. 47 U.S.C. § 253(c).

Plaintiffs contend that the City has violated § 253(b) by regulating "public good" issues in the Ordinance and the August Proposal. However, that sub-section only preserves certain state activities, and does not speak to local regulation. *See Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners,* 199 F.3d 1185, 1192 (10th

Cir.1999) ("section 253(b) applies only to state, not local, regulation"); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 98 civ. 2128, 2000 WL 198104, at * 4 (N.D.Tex. Feb.17, 2000) (agreeing that § 253(b) was not applicable to municipalities). To the extent TCG complains of local regulation, it should rely upon § 253(c). Therefore, as an initial matter, this Court dismisses plaintiff's claims based upon § 253(b) (Claims 6 and 8).[4]

Accordingly, the question of whether the City's actions violate § 253 of the TCA involves a two-step analysis: (i) whether the City's regulations "prohibit or have the effect of prohibiting" the ability of TCG to provide telecommunications services under § 253(a), and (ii) if so, whether they are "saved" under § 253(c).

A. "Prohibit or Have the Effect of Prohibiting" under § 253(a) of the TCA

The parties fundamentally disagree over the scope of § 253(a); namely, the degree to which local actions are preempted under that section. Plaintiffs argue, citing, *inter alia, City of Dallas,* 8 F.Supp.2d at 591, *BellSouth v. City of Coral Springs,* 42 F.Supp.2d 1304, 1307 (S.D.Fla.1999) and *Bellsouth Telecommunications, Inc. v. Town of Palm Beach,* 127 F.Supp.2d 1348, 1352 (S.D.Fla.1999), that § 253(a) broadly preempts action by local municipalities, suggesting that only the narrow range of activities presented in § 253(c) are permissible. Under TCG's reading of the TCA, virtually all local action is preempted, unless, of course, it purports to manage rights-of- way on a non-discriminatory and competitively neutral basis under § 253(c).

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[4] In any event, TCG does not seek to take advantage of the § 253(b) safe harbor.

However, defendant argues, citing legislative history and *In re TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101 (F.C.C. Sept.19, 1997), for a narrower approach. The City contends that § 253(a) only preempts local action that actually prohibits a carrier from providing telecommunications services. Because nothing in the Ordinance or the City's treatment of TCG explicitly prevented TCG from providing telecommunications services in the City, the City argues that there is no violation of § 253(a). Accordingly, the question of whether local action manages the public rights-of-way under § 253(c), the City argues, does not arise since such action is not prohibitory under § 253(a). *See In re TCI Cablevision,* 12 F.C.C.R. 21396, at ¶ 101 ("Parties seeking preemption of a local legal requirement ... must supply ... credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of ¶ 253(b) and/or (c).").

Neither argument is completely compelling. On the one hand, the parameters of what is considered prohibitory under § 253(a) are not likely to be so broad as to preempt any and all local action. Congress could have achieved that result by simply preempting all local action in § 253(a) rather than specifically dealing only with actions which "prohibit or [have] the effect of prohibiting" telecommunications services.*See* 47 U.S.C. § 253(a). On the other hand, the bar set by § 253(a) cannot be so high as to permit local municipalities to frustrate Congress' intent to foster a pro-competitive environment and remove local barriers to entry for telecommunications providers simply by clever statutory drafting. *See RT Communications, Inc. v. FCC,* 201 F.3d 1264, 1268 (10th Cir.2000) (a barrier need not be "insurmountable" or complete to be considered prohibitory under § 253(a)).

The Court need not determine here, however, what the outer parameters of § 253(a) are. Instead, this Court finds only that TCG has met its burden in demonstrating that the regulations and actions of the City (described in the Stipulated Facts) violate § 253(a). *See In re Petition of the State of Minnesota,* F.C.C.R. 99-402, ¶ 11 n. 26 (F.C.C. December 20, 1999) (party seeking preemption bears the burden of proof that there was a violation of ¶ 253(a)).

In this case, the requirements imposed on TCG by the City and the Ordinance, when viewed as a whole and in context, have the effect of prohibiting the ability of TCG to provide telecommunications services. *See Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland,* 49 F.Supp.2d 805, 814 (D.Md.1999). *vacated on other grounds,* 212 F.3d 863 (4th Cir.2000) ("[A]ny process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way" has "the effect of prohibiting" service.); *AT & T Communications of the Southwest v. City of Dallas,* 52 F.Supp.2d 763, 770 (N.D.Texas 1999) (a representation by the city that "without a new franchise ... AT & T may not offer [services]" is "sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a)."); *see also AT & T Communications of the Southwest v. City of Austin,* 975 F.Supp. 928, 939 (W.D.Texas 1997) ("The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition.").

As an initial matter, the Ordinance prohibits a carrier from using the City's rights-of-way without first applying for and then obtaining a franchise. The Ordinance requires that every franchise must contain certain broad terms and

conditions, such as the compensation to be paid to the City, the City's right to inspect facilities and records of the franchisee, a restriction on the assignment or other transfer of the facility without prior written consent by the City, and such other provisions the City determines are necessary or appropriate "in furtherance of the public interest." *See* Ordinance § 2.9.01.

In this particular case, as well documented by the Stipulated Facts, the process of obtaining a franchise has turned into a lengthy and complex negotiation between the parties, spanning over seven years since TCG's initial request in 1992, one a half years since TCG's first request after the promulgation of the Ordinance and more than half a year since TCG's re- application in February 1999. *See City of Austin,* 975 F.Supp. at 938 ("It goes without saying that delayed entry into the local telephone service market can have profound effects on the success of [plaintiff's] venture"). Even if the parties were able to come to terms on the provisions of the franchise agreement, the Ordinance nonetheless gives the Common Council the right to reject the application based on any "public interest factors ... that are deemed pertinent by the City." Ordinance § 2-7. Once the City identifies such factors, § 2.7 starts the entire, complex process all over again. *See Prince George's County,* 49 F.Supp.2d at 814.

Accordingly, while the City's requirements admittedly do not impose an explicit prohibition on TCG, the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains. *See RT Communications, Inc. v. FCC,* 201 F.3d 1264, 1268 (10th Cir.2000) ("the extent to which the [local] statute is a complete bar is irrelevant. Nowhere does the [TCA] require that a bar to entry be insurmountable

before the FCC must preempt it."). As a result, § 253(a) has been violated.

B. Are the City's Regulations Saved by § 253(c)?

A finding that local regulations violate § 253(a) of the TCA is not fatal so long as the defendant can show that those regulations satisfy the safe harbor provisions set forth in § 253(c). [FN5][5] To determine whether § 253(c) is satisfied here, three questions must be addressed. First, do the City's regulations "manage the public rights-of-way"? Second, are the required fees "fair and reasonable compensation" for the use of the public rights-of- way? And third, is the exemption of Bell Atlantic from the City's regulations competitively neutral and nondiscriminatory?[6]

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[5] Once the party seeking preemption sustains its burden to show that a local municipality has violated § 253(a) by prohibiting or effectively prohibiting service, the burden of proving that a statute or regulation comes within the safe harbor in § 253(c) falls on the party claiming that the safe harbor applies--in this case, the City. *See In re Petition of the State of Minnesota,* F.C.C.R. 99-402, at ¶ 11 n. 26 (citing *In re the Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 83 (F.C.C.1997)).

[6] The issue of whether § 253(c) imposes separate restrictions against local regulations apart from the restriction against government prohibition under § 253(a), and, hence, whether an implied cause of action exists under § 253(c), is an open one. *See Cablevision,* 184 F.3d at 98, 99; *Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey,* 1999 WL 494120, at *6 n. 5 (S.D.N.Y. July 13, 1999) ("it is not clear that Section 253(c) provides plaintiff with a private cause of action. No private cause of action is expressly provided, and courts have split over whether one is implied. The Second Circuit has not yet considered this

1. *Do the Regulations Manage the Public Rights-of-way?*

§ 253(c) preserves the authority of local governments to manage the public rights- of-way. A growing number of district courts that have reviewed this issue have relied upon the Federal Communications Commission (the "FCC"), the agency charged with interpreting and enforcing the TCA, for guidance. *See e.g., Omnipoint Communications, Inc. v. The Port Authority of New York and New Jersey,* 1999 WL 494120, at *10-11 (S.D.N.Y. July 13, 1999); *PECO v. Township of Haverford,* 1999 WL 1240941, *4-6, 1999 U.S. Dist. LEXIS, 19409, at 15-19; *Town of Palm Beach,* 127 F.Supp.2d at 1352-53; *City of Coral Springs,* 42 F.Supp.2d at 1308; *Prince George's County,* 49 F.Supp.2d at 815; *City of Dallas,* 8 F.Supp.2d at 591-92.

In *In re Classic Telephone, Inc.,* 11 F.C.C.R. 13082 (F.C.C.1996), the FCC quoted from the comments of Senator Diane Feinstein in the Congressional Record, citing examples of the kinds of regulations Congress intended to permit under ¶ 253(c):

-- "regulat[ing] the time or location of excavation to

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issue.") (internal citations omitted); Compare *GST Tucson Lightwave, Inc. v. City of Tucson,* 950 F.Supp. 968 (D.Ariz.1996) (finding no private right of action); with *TCG Detroit v. City of Dearborn,* 977 F.Supp. 836 (E.D.Mich.1997), affirmed, 206 F.3d 618 (6th Cir.2000)(finding a private right of action). In any event, since this Court has held that § 253(a) was violated, § 253(c) is automatically triggered, and the Court need not decide that open issue here.

preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts"

-- "requir[ing] a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies"

-- "requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations"

-- "enforc[ing] local zoning regulations" [and]

-- "requir[ing] a company to indemnify the City against any claims of injury arising from the company's excavation."

Id. ¶ 39 (citations omitted).

These categories of activities were expanded in *In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101, where the FCC stated:

> Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.... [T]ypes of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Id., 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 103. There, the FCC expressed concern over a "third tier" of regulation by some localities that appear to "reach[ ] beyond traditional rights-of-way matters," including most favored nation requirements and mandating that franchisees interconnect

with other telecommunications systems for furtherance of universal service. *Id.*, 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 105. Accordingly, any attempt to regulate beyond the circumscribed scope of activities related to public rights- of-way is beyond the scope of ¶ 253(c).

a. *The Ordinance*

The Ordinance sets forth a three-part process for obtaining local approval. First, the applicant must complete a pre-franchise application to the Commissioner of Public Works and the Office of Corporation Counsel. *See* § § 2- 3-02(i)--(viii). Second, the applicant and City must then negotiate over the specific terms required to be included in the franchise agreement. *See* § § 2.9.01(i)--(xvii). And third, once it has been fully negotiated. the Common Council must review and separately approve the franchise agreement. *See* § § 2- 7-01(i)--(vii).

The pre-franchise application process seeks certain information that could easily be construed as relating to the management of the public rights-of-way, such as contact information of the applicant (§ 2-3-02(i)), a description of the proposed franchise area (§ 2-3-02(iii)), a proposed construction schedule (§ 2-3-02(iv)), a map of the proposed location of the applicant's telecommunications system (§ 2-3-02(v)), and ownership of the applicant and identification of affiliates (§ 2-3-02(viii)). These provisions "relate directly to the construction of a telecommunications facility, and seeks descriptions of how the new facility fits into the affected rights-of- way." *City of Coral Springs,* 42 F.Supp.2d at 1310.

However, the parties have conceded that § 2-03-02(ii), which requires a description of the telecommunications services to be provided, does not

directly relate to the management of the City's rights-of-way. *See* Stipulated Facts ¶ 43. This Court agrees, and, accordingly, § 2-03-02(ii) violates § 253(c) and is preempted by the TCA.[7] *See City of Coral Springs,* 42 F.Supp.2d at 1309 ("the City does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities.").

Moreover, § § 2-3-02(vi) and (vii) require information concerning the provider's proposed financing for the operation and construction of the services to be provided, as well as a description of the applicant's legal, financial, technical and other appropriate qualifications to hold the

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[7] "The determination of whether an invalid portion of a state statute can be severed from the valid portions so that the remainder of the statute can be preserved is a question of state law." *Gary D. Peake Excavating Inc. v. Town Board of the Town of Hancock,* 93 F.3d 68, 72 (2d Cir.1996). The New York test for severability is whether the state legislature "would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100, 110 (2d Cir.1999) (internal quotations omitted). Moreover, under New York law, " 'a court should refrain from invalidating an entire statute when only portions of it are objectionable.' Although the presence of a severability clause is not dispositive, '[t]he preference for severance is particularly strong when the law contains a severability clause.' " *Gary D. Peake,* 93 F.3d at 72 (quoting *National Advertising Co. v. Town of Niagara,* 942 F.2d 145, 148 (2d Cir.1991)). Given the presence of the severability provision in the Ordinance, *see* § 3-1 of the Ordinance, and the New York standard of severability, this Court declines to invalidate the entire Ordinance, but rather just the portions of the statute it finds invalid.

franchise. Setting aside the fact that § 94 of the New York Public Service Law appears to have already delegated the authority to review these categories of information to the New York Public Service Commission ("PSC"), a number of courts have ruled that regulations requiring "the applicant [to] submit proof of its financial, technical and legal qualifications" do not regulate the public rights-of-way. *Town of Palm Beach,* 127 F.Supp.2d at 1355; *City of Dallas,* 8 F.Supp.2d at 593 ("Dallas also does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services."); *City of Coral Springs,* 42 F.Supp.2d at 1310 (striking local statute requiring that the applicant submit proof of its "financial, technical and legal qualifications"). Therefore, § § 2-3-02(vi) and (vii) are preempted by the TCA.

In connection with the requirement that a franchise agreement be negotiated, the Ordinance sets forth the terms that must be incorporated in such an agreement. *See* § 2.9.01(i)--(xvii). Aside from § 2.9.01(iii) (*see infra,* § II.B.2), the terms identified in the Ordinance, for the most part, properly address rights-of-way and related issues.

To begin with, several of § § 2.9.01's requirements deal with general unobjectionable provisions to be included in the franchise agreement--the term of the franchise (§ 2.9.01(i)), circumstances upon which the franchise may be terminated or cancelled (§ 2.9.01(iv)), and provisions to ensure that the franchisee comply with applicable laws (presumably so long as they comport with the TCA) (§ 2.9.01(x))--while certain others relate directly to the core of the City's rights-of- way authority discussed in the FCC cases above-- provisions concerning performance bonds, security, insurance and indemnification requirements (§ 2.9.01(v) and (vii)), provisions to ensure workmanship

quality and construction methods (§ 2.9.01(ix)), obligations to supply an engineering site plan (§ 2.9.01(xi)), requirement that franchisee obtain all necessary licenses (§ 2.9.01(xiv)), provisions protecting the City from property damage or interruption of operations (§ 2.9.01(xv)), and provisions designed to minimize the extent to which public use of the streets are disrupted (§ 2.9.01(xvi)). *See In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101; *In re Classic Telephone, Inc.,* 11 F.C.C.R. 13082, at ¶ 39.

Further, § 2.9.01(xii), which restricts the assignment or transfer of the franchise without the prior consent of the City, prevents a carrier from escaping the City's rights-of-way regulation by simply having the franchise assigned to it after it was approved for another entity. § 2.9.01(xiii) relates to remedies available to the City to protect the City's interests in the event the franchisee defaults under or fails to comply with the agreement. These provisions are simply enforcement mechanisms designed to give meaning and effect to valid provisions of the franchise. *See Town of Palm Beach,* 127 F.Supp.2d at 1355 (stating that provisions "provid[ing] the mechanism for the Town to enforce [the] ordinance" was "valid in its entirety.").

However, the remaining four sub-sections in this section of the Ordinance are either invalid or potentially problematic. First, for reasons already discussed, § 2.9.01(ii), which requires information concerning the nature of the telecommunications services to be offered, does not manage the rights-of-way and is invalid. Second, § 2.9.01(xvii), which permits the City to include any provisions in the franchise which it "determines are necessary or appropriate in furtherance of the public interest," is, in this case, too overly-vague and overly-broad to be in compliance with § 253(c) of the TCA. The

discretion afforded the City in adding any provision that it considers to be in the "public interest" go well beyond the traditional scope of management of the public rights-of-way. Accordingly, the Court finds that sub-section to be preempted by the TCA because it leaves the City near total discretion to approve or reject an application.

Finally, the Court notes that § 2.9.01(vi), which relates to the City's right to inspect facilities and records of the franchisee, and § 2.9.01(viii), which requires that the franchisee maintain complete and accurate books and the City's inspection rights thereto, must be read narrowly to satisfy the requirements of § 253(c). Therefore, while the City has broad rights to negotiate provisions permitting it to inspect facilities in the rights-of-way, its rights concerning inspection of records and requiring the carrier to maintain complete and accurate records must be limited to information necessary to enforce its rights-of-way regulations and to ensure that it has received accurate fee information.

The third part of the approval process set forth in the Ordinance deals with the review by the Common Council of the franchise agreement after it has been fully negotiated. Sections 2-7-01(i)--(vii) set forth the factors that the Common Council may use in deciding whether to accept or reject a negotiated franchise.[8] Factors relating to the ability of the applicant to maintain the property of the City in good condition (§ 2-7-01(iii)), services or uses of the streets that may be precluded by the grant of the franchise, as well as any adverse impact of the proposed franchise in the efficient use of the streets (§ 2-7-01(iv)), and the willingness of the

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[8] § 2-7-01(i), which permits the Council to consider the adequacy of the proposed compensation to be paid to the City, is again set aside for a later discussion (*infra* § II.B.2).

applicant to meet construction and physical requirements and abide by all lawful conditions (§ 2-7-01(v)) fall within the City's authority to manage the public rights-of-way.

For reasons previously discussed, § 2-7-01(ii), which permits the Common Council to consider the legal, financial and technical qualifications of an applicant in deciding whether to approve the franchise, is not valid and is preempted by the TCA.

The remaining two sub-sections under § 2-7-01 are problematic as they permit approval based upon the "adequacy of the ... franchise agreement ... to protect the public interest" (§ 2-7-01(vi)), as well as "any other public interest factors or considerations ... that are deemed pertinent by the City for safeguarding the interests of the City and the public" (§ 2-7-01(vii)). These provisions give the Council nearly unfettered discretion in rejecting an otherwise proper application for a franchise. *See Prince George's County,* 49 F.Supp.2d at 816 ("most objectionable is the fact that the ordinance vests the County with complete discretion to grant or deny a franchise application based on a wide-ranging set of factors that include "whether the proposal will serve and protect the public interest." "); *PECO Energy,* 1999 WL 1240941, * 6, 1999 U.S. Dist. LEXIS 19409, at *20 ("This apparently limitless discretion of the Township Manager to grant or deny a franchise places the Ordinance outside the ambit of the TCA's safe harbor."); *City of Dallas,* 8 F.Supp.2d at 593 ("The City does not, however, have the authority to grant or deny that franchise based on its own discretion."). Accordingly, those sub-sections of the Ordinance are preempted by the TCA and are invalid.

b. *The August Proposal*

The provisions set forth in the August Proposal, and

the modifications thereto, are provisions that the City has indicated that it intends to impose onto TCG--in other words, they are provisions that TCG must accept in order to obtain a franchise. Accordingly, each of the provisions therein must comport to § 253(c), and, therefore, must also relate to the management of the City's public rights-of-way.

Against this backdrop, the Court reviews the following provisions of the August Proposal objected to by TCG in its trial brief.[9]

1. Non-exclusivity (§ 2.2): TCG's objection to this provision is not clear. To the extent it objects to the statement that the franchise is nonexclusive, plaintiffs have no valid complaint as nonexclusivity is required by the TCA. To the extent TCG complains about the wording of that provision which, under one reading, could purport to regulate telecommunications services--"[t]his franchise is a non-exclusive grant to provide Services pursuant to the terms herein"--that phrase has been replaced with clearer language in the August Proposal--"[t]his franchise is a nonexclusive grant to construct, operate and maintain the Fiber Optic Network in the Streets for the purpose of providing Services."

2. "Most favored vendees" clause (§ 2.7): Under this provision, if the City, or an elementary or secondary educational institution in the City, should contract with TCG for any of its services, TCG is required to offer them rates

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[9] As noted earlier (*supra* at note 3) certain provisions objected to by TCG are mooted by the replacement of the May 1999 draft with the August Proposal. Moreover, provisions relating to franchise fees are addressed below (*infra* § II.B.2).

and terms no less favorable than those offered to any other governmental or nonprofit agency in Westchester County. While the City innocently frames this provision as a form of "in-kind compensation," this Court finds that it is more akin to a regulation of TCG's rates, terms and conditions of service unrelated to TCG's use of the public rights-of-way, and resembles the kind of "most favored nations" clauses found to be unlawful by the FCC in *In re TCI Cablevision,* 12 F.C.C.R. 21396, at ¶ 105 (citing "most favored nations" mandates as examples of local regulation over the "rates, terms and conditions" of service that are "difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority").

3. Representation of no conflict with laws (§ 3.1(4)): Section 3.1(4) seeks to require TCG to waive its legal right, including those under the TCA, to challenge the terms or conditions of the franchise agreement. As the cases make clear, these restrictions do not relate to rights-of-way management. *See In re Classic Telephone, Inc.*, 11 F.C.C.R. 13082, at ¶ 39; *In re TCI Cablevision,* 1997 WL 580831, 12 F.C.C.R. 21396, at ¶ 101. As such, a requirement that TCG waive its legal challenges in order to obtain the City's consent to provide telecommunications services is invalid under § 253(c). However, portions of the provision relating to the legal authorization of TCG to enter into the agreement and assume the obligations thereunder are standard contractual representation and warranty provisions that do not violate § 253(c).

4. Examination of records in connection with franchise fees (§ 8.5): This provision is specifically limited to the examination of documents related to the payment of fees and therefore is necessary to accurately determine and to collect fees permitted by the TCA. *See Town of Palm Beach,* 127 F.Supp.2d at 1354.

5. Approval for location of construction (§ 11.9(d)): TCG objects to this provision requiring that the City approve the location of any part of the network prior to its construction because it may include construction performed on private, as opposed to public, property. While it may be theoretically possible for construction on private property to impact the public rights-of- way, this provision is not limited to such situations and would require approval even where the construction would have no effect whatever on public rights-of-way. Accordingly, this provision is invalid under § 253(c).

6. Examination of records (§ 12): These provisions permit the City broad rights to inspect and oversee the business of TCG, including the obligation of TCG to maintain complete and accurate books concerning its operations (§ 12.1). These provisions also grant the City the right to audit all accounting and financial records of TCG related to the fiber optic network on three days notice (§ 12.1), and require the availability of all such records at a particular location and/or upon request by the City (§ 12.2). These provisions go farther. They require annual submissions of a map setting forth the major physical elements of the network (§ 12.3), the approval of all locations of the network by the City (§ 12.3), and the submission of any financial information requested by the City concerning TCG's financial capability to comply with the agreement, as well as any information necessary to carry out the City's ability to manage the public streets (§ 12.4).

As discussed earlier, any requirement of maintenance and inspection of records must be limited to information necessary to enforce the City's rights-of-way regulations and to ensure that the City has received an accurate fee. The City's limited authority does not give it the power to

micromanage TCG's business through audits and submission of detailed financial records, unless they are directly related to the rights-of-way or a proper fee. Accordingly, § 12.1 is far too broad to satisfy § 253(c) and, for that reason, is invalid. *Prince George's County,* 49 F.Supp.2d at 810 (finding requirement invalid that company provide financial information as not relating to rights- of-way management); *City of Dallas,* 8 F.Supp.2d at 593; *City of Coral Springs,* 42 F.Supp.2d at 1310. Moreover, as § 12.2 relates to records discussed in § 12.1, it is also invalid.

While the Court finds § 12.3's requirement for a submission of an annual map generally valid as an exercise of the City's rights-of-way management, its requirement that all locations be approved by the City is invalid for the same reasons discussed above concerning § 11.9(d). Finally, because § 12.4 limits itself to information necessary to carry out the City's management of the public streets as well as TCG's ability to pay the required fee, this section is consistent with the scope of § 253(c).

Waiver to challenge terms of the franchise agreement (§ 13.6): for substantially the same reasons discussed above concerning § 3.1(4) above, this kind of requirement of waiver does not resemble the kinds of rights-of-way management contemplated by the FCC cases described above, and, accordingly, is invalid under § 253(c).[10]

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[10] TCG also asserts two additional claims under § 253(c) concerning the City's rights-of-way management. First, TCG claims that the City may not assess a franchise fee or require a franchise agreement for TCG's resale of Bell Atlantic's services since this resale does not impact the public rights-of-way (Claim 11). However, the Stipulated Facts show that TCG has been selling telecommunications services in the City on a resale basis since 1993, and has never been

2. *Are the proposed franchise fees "fair and reasonable compensation" under § 253(c)?*

The parties dispute whether the proposed fees are "fair and reasonable compensation" under § 253(c) of the TCA. The Ordinance itself provides little or no guidance on the calculation of the fees to be imposed by the City, leaving the details of the compensation to be negotiated in the franchise agreement. *See* § 2.9.01(iii) of the Ordinance. Once the franchise is fully negotiated, § 2-7-01(i) permits the Common Council to review and pass on the proposed fee. So long as the fees themselves comply with § 253(c), the Court does not view these provisions to be problematic under the TCA.

Section 8 of the August Proposal sets forth four categories of fees and costs to be paid by TCG to the City. First, § 8.1(a) imposes an annual franchise fee equal to five percent of all revenue derived by TCG or its affiliates in connection with the operation of the proposed telecommunications facilities within the City limits. Second,

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required by the City to pay a fee or enter into a franchise for such activity. *See* Stipulated Facts ¶ 16. Moreover, the City acknowledges in its trial papers that it does not now seek a fee or a franchise for such resales. As there is no controversy, Claim 11 is dismissed. Second, TCG claims that the City cannot charge a fee or require a franchise for cables TCG seeks to run through preexisting conduit owned by Bell Atlantic (Claim 12). The fact that TCG will use some preexisting conduit, however, does not affect the City's authority to manage the rights-of-way or impose a franchise fee, since cables will nevertheless be placed in the public rights-of-way. Accordingly, Claim 12 is dismissed, albeit through conduit already constructed by another party.

§ 8.1(b) imposes a minimum annual fee starting from $5,000 in the first year, gradually increasing to $10,000 after the fifteenth year. Third, § 8.1(c) requires TCG to pay for costs of third parties (including attorneys' and consultants' fees) in connection with the award of the franchise. Fourth, § 8.2 requires that TCG build one thousand feet of conduit for the City at points where its proposed network overlaps the City's network currently under construction. Moreover, the provision also requires that TCG install additional conduit for municipal purposes along the proposed network for which the City would reimburse TCG for costs of materials. The City considers the requirements set forth in § 8.2 as "in kind" compensation to be paid by TCG. In addition, § 16 of the August Proposal requires that TCG's parent guarantee TCG's obligations under the agreement.

Complicating the analysis of whether these fees are proper under § 253(c), courts are split as to the nature of the fees local municipalities may charge carriers. Some courts have concluded that to be "fair and reasonable," fees must be directly tied to the carrier's use of and/or the municipality's costs of maintaining the public rights-of-way. *See Prince George's County,* 49 F.Supp.2d at 817 (fees must be set at a level reasonably calculated to compensate municipalities for the costs of administering franchise programs and maintaining the rights-of-way); *City of Dallas,* 8 F.Supp.2d at 593 ("the City does not have the authority to impose fees on a telecommunications provider except as compensation for use of the City's rights-of-way"). Consequently, fees based on revenue or overall profits would not be "fair and reasonable compensation." This authority suggests that § 253(c) limits municipalities to the recovery of reasonable costs and does not permit cities to profit from the use of its rights-of-way by others.

However, authority from this District points in

another direction, concluding that this reading of the word "compensation" may "too severely limit the term" because such a reading would treat § 253(c) as if it permitted recoupment of "costs" rather than gaining of "compensation." *Omnipoint*, 1999 WL 494120, at *6 (citing *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 789 (E.D.Mich.1998)). "Moreover, the term "compensation" has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses. It is thus doubtful that Congress, by the use of the words "fair and reasonable compensation," limited local governments to recovering their reasonable costs."[11] *Id.*

Consequently, the *Omnipoint* court and others have been willing to permit fees based upon general revenues and other considerations not directly related to a municipality's expenses in maintaining the rights-of-way. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir.2000) (affirming district court ruling upholding fee based on 4% of gross revenue, lump sum franchise fee, and conditional requirement that plaintiff install conduit for the city at no charge); *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 337 S.C. 35, 43, 522 S.E.2d 804 (S.C.1999) (finding "franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable"); *Omnipoint*, 1999 WL 494120, at *6-8 (finding that local

[11] Moreover, as acknowledged by the parties in the Stipulated Facts, calculating the impact or costs of telecommunications providers on the public rights-of-way would not be a simple undertaking. *See* Stipulated Facts ¶ 45. A number of intangible factors would need to be considered, including the shortened life of pavement, added police costs to deal with traffic disruptions, interference with the City's other systems, impact on traffic, and offsetting benefits to the City from the availability of multiple telecommunications providers.

governments were not likely limited to recovering only their reasonable costs of rights-of-way). These cases have found nothing inappropriate with cities charging "rent" for the use of city-owned property for private purposes. *See Omnipoint,* 1999 WL 494120, at 6; *TCG Detroit v. City of Dearborn,* 16 F.Supp.2d 785, 789 (E.D.Mich.1998), affirmed, 206 F.3d 618, 625 (6th Cir.2000); *see also City of St. Louis v. Western Union Tel. Co.,* 148 U.S. 92, 99, 13 S.Ct. 485, 37 L.Ed. 380 (1893) ("Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied ... ? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease ... it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.").

The "rent" charged, however, must be "fair and reasonable." *City of Dearborn* held that this fairness determination should be made by examining the totality of the facts and circumstances in the case. *City of Dearborn,* 16 F.Supp.2d at 789, affirmed, 206 F.3d at 625. There, the district court identified four non-exclusive factors relevant to whether the fees exacted from the telecommunications provider by the city of Dearborn--fees which were substantially similar to those the City is trying to impose here--were not inappropriate: "(1) the extent to use of the public rights-of-way; (2) whether other carriers have agreed to comparable compensation (or comparable uses of public rights-of-way); (3) the course of dealings among the parties; and (4) whether the compensation sought is 'so excessive that it is likely to render doing business unprofitable.' " *Omnipoint,* 1999 WL 494120, at 7 (citing *City of Dearborn,* 16 F.Supp.2d at 790-91).

Applying the *City of Dearborn* factors to the record as set forth in the Stipulated Facts, this Court finds that the City has sustained its burden to prove that the fees sought to be imposed are fair and reasonable. First, the contemplated use of the public rights-of-way by TCG appears to be extensive. Although TCG first submitted an application in 1998 to install less than 2500 feet of fiber optic cable and about 240 feet of underground conduit, it now appears that TCG intends to "construct and operate facilities for the provision of telecommunications services throughout the City." Stipulated Facts ¶ 54.

Second, a number of other carriers have agreed to the fee provisions proposed by the City here. Northeast Networks, Inc., Metromedia Fiber Network Services. Inc. and Brooks Fiber Communications each have franchise agreements with the City imposing a franchisefee based upon 5% of its gross revenues in the City limits. Metromedia and Brooks Fiber's franchise agreements also impose substantially identical additional fees, including a minimal annual fee ranging from $5,000 to $10,000, a requirement that they pay third party costs, and a provision requiring that they build additional conduit for the City at no charge. In addition, Brooks Fiber's agreement requires a guarantee from the its parent. *See* Stipulated Facts, Exhibits 7, 29, 30 and 39. The Court also notes that carriers in other jurisdictions have apparently agreed to pay fees based upon gross revenues. *See City of Dearborn,* 16 F.Supp.2d at 790 (upholding 4% gross revenue fee, and noting 3 other carriers who agreed to similar fees); *City of Orangeburg,* 337 S.C. 35, 522 S.E.2d 804, 808; *City of Coral Springs,* 42 F.Supp.2d at 1309; *Town of Palm Beach,* 127 F.Supp.2d at 1353, *City of Tucson,* 950 F.Supp. at 971. Moreover, as discussed below, TCG itself appears to have accepted the fee provision during negotiations. Indeed, TCG has entered into other agreements in New York State in which it has agreed

to pay a franchise fee that is calculated on the basis of gross revenue. *See* Stipulated Facts ¶ 64.

Third, the record clearly shows that negotiations were on-going and fairly constant since 1992, and resulted in extensive give-and-take by the parties, represented by knowledgeable counsel, over numerous proposed provisions.

Lastly, there is no basis to conclude that the fees sought would likely render doing business with the City unprofitable. As noted, other prospective franchisees have accepted them. On a number of occasions during negotiations, it appeared as if TCG itself would have accepted the fees requested and, at a minimum, the extensive correspondence and communications between the parties does not suggest that the level of fees proposed would have caused TCG to refuse to deal with the City.[12]

In light of these factors, the Court concludes that the City has demonstrated that the fees it seeks to impose in the August Proposal, including the guarantee provision,[13] are

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[12] For example, a TCG attorney in 1994 stated that it was her guess that TCG was willing to pay the 5% franchise fee in order to get into the business since another carrier had agreed to that amount. *See* Stipulated Facts ¶ 19. In addition, TCG twice gave the City written comments on proposed franchise agreements--once in 1994 and once in late 1998--without deleting the fee provisions. *See* Stipulated Facts ¶ ¶ 19 and 60. Moreover, a TCG executive conceded that TCG would have been willing to pay a 5% franchise fee and the other fees as late as August 1998. *See* Stipulated Facts ¶ ¶ 60 and 61. These examples reveal that TCG itself did not think such fees were likely to render business in the City unprofitable.

[13] As the underlying fees are upheld to be fair and reasonable, the Court sees no reason why a guarantee from TCG's

neither unfair nor unreasonable compensation under § 253(c) of the TCA.

3. *Is the Treatment of Bell Atlantic competitively neutral and nondiscriminatory?*

Even if the regulations required by the City are found to manage the public rights-of-way and the fees it seeks to impose are found to be "fair and reasonable," § 253(c) is not satisfied unless the City can show that the regulations and compensation sought to be imposed are done so on a "competitively neutral and nondiscriminatory basis."[14] TCG contends that Bell Atlantic's exemption from having to enter into a franchise or from having to pay a fee is non-competitive and discriminatory, and, therefore, violates § 253(c).

The City need not treat Bell Atlantic and TCG identically in order to satisfy § 253(c). *See Cablevision,* 184 F.3d at 103 ("As long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated against [the entrant] in favor of [the incumbent carrier]."); *City of Dearborn,* 16 F.Supp.2d at 792 ("the

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parent--which serves only to provide the City with greater assurance that its fees are paid on a timely and reliable basis--would not be similarly upheld.

[14] At least one case has questioned whether § 253(c) imposes the requirement of competitive neutrality and nondiscrimination on the fee alone or whether it applies to both the fee and the municipality's management of the rights-of-way. *See Cablevision,* 184 F.3d at 100-02. This Court need not decide that issue here, and instead assumes *arguendo*-- as the First Circuit did in *Cablevision*--that the requirement applies to both the fee charged and the City's management of its rights-of-way.

explicit language of the statute does not require such strict equality."); *City of Dallas*, 8 F.Supp.2d at 593 ("being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them.").

Indeed, Congress offered a "parity" provision that would have prohibited local governments from imposing a fee that distinguished among different providers, including the incumbent provider. 141 Cong. Rec. H8427 (Aug. 4th 1995). In opposition to this proposal, Representative Stupak stated:

> Local governments must be able to distinguish between different telecommunication providers. The way the [parity] amendment is right now, they cannot make that distinction. For example, if a company plans to run 100 miles of trenching in our streets and wire to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings. The [parity] amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.
>
> Congress promptly rejected this provision, and adopted instead the current version of § 253(c).

Here, the City presents powerful reasons why Bell Atlantic should be treated differently. For nearly one hundred years, Bell Atlantic has been installing equipment and facilities under the City's streets. Over this long period

of time, Bell Atlantic has, in fact, been paying a fee to the City, in the form of having provided the City with free use of its conduit--a valuable asset--in exchange for using the rights-of-way. Specifically, Bell Atlantic has provided additional conduit at no charge for the City to build a communications system involving the City's police and fire facilities, traffic control system, schools, libraries and other municipal buildings. Moreover, Bell Atlantic must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers.

Of the non-fee related provisions to which TCG objects and that have not been preempted by this Court, the focus of those remaining regulations in the Ordinance and the August Proposal seem to functionally apply only to those providers who intend to install new equipment and facilities in the rights-of- way and engage in new construction--e.g., submission of construction plans, performance bonds, indemnification for damage to property, regulations designed to minimize street disruption.

As TCG has not presented sufficient evidence showing that Bell Atlantic has newly constructed conduits or is engaged in any activity that may otherwise impact the physical rights-of-way of the City since the adoption of the Ordinance,[15] it cannot be said that exempting Bell Atlantic

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[15] There is only one mention of construction activity by Bell Atlantic in the last decade. *See* Stipulated Facts ¶ 116 ("The majority (maybe as much as 75%) of the conduit constructed by Bell Atlantic for use by the City was constructed prior to 1990. In many of the thoroughfares in the downtown area, the underground conduit predates 1990; any new conduit was probably placed in underlying areas or in short sections."). TCG has simply failed to adduce an appropriate

from those particular regulations has had a discriminatory or non-competitive effect.[16] Compare *Cablevision,* 184 F.3d at 103 ("Constructing new conduit requires digging up the City's streets and attendant disruption. Putting new cable in existing conduit or converting existing cable to new uses does not require digging up streets or disruption. Thus, it is not discrimination for the City to have different policies for the construction of conduit that is new and for the conversion of the uses to which existing conduit can be put.").

The fees that the City wishes to impose, however, are not based upon the construction of new facilities, but rather on the existence of revenue and the provision of services from networks running in the City's right-of-way. In this regard, the imposition of a disparate fee could, indeed, have a discriminatory or non-competitive effect.

Here, the City has offered evidence of what it considers to be Bell Atlantic's compensation-in-kind to the City by providing an extensive underground conduit network throughout the City, housing eleven miles of the City's cable network, free municipal use of conduit for certain governmental agencies, and universal service to all City residents. *See e.g.,* Stipulated Facts ¶ ¶ 113, 114, 116, 134-

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factual predicate on this record to show that Bell Atlantic engaged in new construction activity in the City since the adoption of the Ordinance in December 1997. Accordingly, this opinion does not address the implications of such new construction, if any.

[16] Whether Bell Atlantic itself would be required to be subject to the Ordinance, including a franchise agreement, if it decides to build more conduit or construct other telecommunications facilities in the City's rights-of-way in the future is a question beyond the scope of this particular dispute.

39. This extensive network Bell Atlantic has built clearly has been the result of a large capital expenditure by Bell Atlantic. Moreover, although the total amount has never actually been calculated, Bell Atlantic has foregone fees it could have charged the City for such municipal uses. *See* Stipulated Facts ¶ 118.

The Court finds this evidence is sufficient to sustain the City's burden that the fees charged to TCG and the fees paid by Bell Atlantic are competitively neutral and nondiscriminatory. TCG offers no proof that the fee "charged" to Bell Atlantic, as opposed to that which would be imposed on TCG, would have a noncompetitive or discriminatory effect. Simply asserting that the fees being charged were "different" or "unequal" is an insufficient demonstration that they are non-competitive or discriminatory in violation of § 253(c). *See City of Dearborn,* 16 F.Supp.2d at 792 ("Nothing in the debate of the Stupak-Barton amendment, which became § 253(c), indicates that it was intended to force local authorities to charge exactly the same fees and rates, and, in fact, it explicitly rejects that proposition."); *City of Dearborn,* 16 F.Supp.2d at 792 ("competitively neutral" and "nondiscriminatory" is not the same as being identical) (citing 141 Cong. Rec. H8427).

II. New York State Law

Plaintiffs contend that the City's actions also violate New York State law (Claims 9 through 12). The Court discusses each of the two claims separately below.

A. The New York Transportation Corporations Law

TCG contends that the August Proposal violates § 27

of the New York Transportation Corporation Law, which provides that a corporation deemed a "Telephone Corporation" under that act is authorized to place equipment in the local rights-of-way. N.Y. Trans. Corp. Law § § 2 and 25 (granting the right to "erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways."). Moreover, § 27 states that a corporation subject to it is "authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state."

However, that statute also requires the permission of the local government to install any such equipment: "provided that such corporation shall, before laying any such line in any city, village or town of this state, first obtain from the common council ... permission to use the streets within such city, village or town for the purposes herein set forth." § 27 of N.Y. Trans. Corp. Law.

While TCG contends that the local government's authority under § 27 is limited to giving permission as to where the facilities can be located, state courts have held that local governments may, consistent with their charters, require franchises. *See People's Cable Corp. v. City of Rochester,* 70 Misc.2d 763, 334 N.Y.S.2d 972 (N.Y.Sup.1972) (upholding--in response to challenge under § 27--the authority of a local municipality to impose a franchise fee on a cable operator); *Staminski v. Romeo,* 62 Misc.2d 1051, 1053, 310 N.Y.S.2d 169 (N.Y.Sup.1970) (noting that § 27 of the N.Y. Trans. Corp. Law requires that telegraph and telephone companies "obtain permission of the city ... authorities to use local streets for the construction of its lines," and that this requirement has resulted in "companies having to obtain local franchises when they sought to construct ... either above or below the public

highways").

As the City's charter expressly authorizes it to seek a franchise and mandates that the franchisee "be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise" as shall be fixed by the agreement as "fair compensation," § 27 of the N.Y. Transportation Corporations Law is not violated. *See* Charter of the City of White Plains § 33 (Stipulated Facts, Ex. 3). Compare *New York Telephone Company v. City of Amsterdam,* 200 A.D.2d 315, 317-18, 613 N.Y.S.2d 993 (App.Div.1994) (ruling that fee exacted in relation to excavation permit on per square foot basis was an unauthorized tax); with *Niagara Mohawk Power v. New York State Department of Transportation,* 224 A.D.2d 767, 769, 637 N.Y.S.2d 505 (App.Div.1996) (distinguishing between "permit fees ... imposed under the power to regulate" held invalid under *Amsterdam* with "fee ... for a license permitting ... entry upon respondents' lands for the purpose of erecting transmission lines [based on fair market rental value]," and ruling that the latter is permissible).

B. The New York Public Service Law

Plaintiffs assert that New York Public Service Law § § 94 and 99 limit the City's regulatory authority under the Ordinance and the franchise agreement by granting the PSC exclusive jurisdiction to regulate certain activities of telecommunications providers (Claim 10). According to plaintiffs, those aspects include, *inter alia,* the capitalization of telephone companies and their facilities, the manner in which their lines and property are leased, operated, or managed, the safety and security of lines, and the authority to inspect the property and records of the telephone carrier. *See* N.Y. Pub. Serv. Law § 94(2).

Plaintiffs argue that because TCG has obtained the necessary certificate of public convenience and necessity from the PSC, it follows that the PSC has reviewed and analyzed TCG's legal, financial and technical ability to construct and operate telephone and telecommunications facilities, and has found TCG to be qualified. Accordingly, plaintiffs claim that portions of the Ordinance and the August Proposal overlap with the PSC's jurisdiction and should be preempted.

Most of those provisions which TCG asserts are duplicative of, or are in conflict with, the PSC's jurisdiction either have been mooted by the August Proposal or dismissed by this Court. Accordingly, the Court need not address those particular sections of the Ordinance or the August Proposal.

The remaining provisions, which relate to topics such as renewal terms of the franchise, rights upon the termination of the franchise, change of control and assignment, do not, in this Court's opinion, implicate § 94 of the N.Y. Public Service Law in the manner TCG asserts. Accordingly, Claim 10 is dismissed.

III. Due Process Under the Fourteenth Amendment

TCG claims that the City has violated its due process rights under the Fourteenth Amendment by taking, without compensation, TCG's "right" under the New York Transportation Corporation Law to use the public rights-of-way (Claim 13). As discussed above, the City has not "taken" property from TCG that was granted under § 27 of the N.Y. Transportation Corporations Law, but, instead, has exercised its right to approve or deny permission as granted by that statute. The City was simply exercising its regulatory

powers in requiring TCG to agree to a franchise, and, accordingly, is not in violation of the 14th Amendment. *See New York Telephone Company v. Commissioner of New York State Department of Transportation,* 62 Misc.2d 6, 307 N.Y.S.2d 945, 949 (N.Y.Sup.1970) (finding no deprivation of property without just compensation under 14th Amendment where telephone company subject to § 27 of N.Y. Trans. Corp. was denied state franchise to install buried telephone cable); *see also New York Telephone Company v. Town of North Hempstead,* 41 N.Y.2d 691, 699- 700, 363 N.E.2d 694, 395 N.Y.S.2d 143 (1977) (noting that "[t]elephone [c]ompany's right to erect poles under section 27 of the Transportation Corporations Law has been held to be a license or privilege" and not a property interest).

Moreover, even if the City's requirement of a franchise were to have taken a valid property interest, the City's requirements would, for 14th Amendment purposes, constitute a permissible economic regulation. *See Eastern Enterprises v. Apfel,* 524 U.S. 498, 523, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (noting that "party challenging government action as an unconstitutional taking bears a substantial burden," and that "[g]overnment regulation often curtails some potential for the use or economic exploitation of private property, ... and not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense.") (internal quotations and citations omitted). Accordingly, plaintiffs' constitutional claim under the 14th Amendment is dismissed.

CONCLUSION

For the foregoing reasons, this Court finds in favor of plaintiffs, in part, and in favor of defendant, in part. The parties are directed to settle a judgment in 14 days on 5 days notice.

SO ORDERED.

CITY OF WHITE PLAINS TELECOMMUNICATIONS FRANCHISING AND LICENSING ORDINANCE[1]
(adopted Dec. 1, 1997)

Article 1

DEFINITIONS

Sec. 1-1. *Definitions*

For purposes of this chapter, the following terms, phrases, words and their derivations shall have the meanings set forth in this section, unless the context clearly indicates that another meaning is intended. When not inconsistent with the context, words used in the present tense include the future, words used in the plural number include the singular number and words used in the singular number include the plural number.

1-1-01. "*Affiliated person*" means each person who falls into one (1) or more of the following categories: (i) each person having, directly or indirectly, a controlling interest in the applicant; (ii) each person in which the applicant has, directly or indirectly, a controlling interest; (iii) each officer, director, joint venturer or joint venture partner, of the applicant; and (iv) each person, directly or indirectly, controlling, controlled by, or under common control with, the applicant; provided that "affiliated person" shall in no event mean the city or any creditor of the applicant solely by virtue of its status as a creditor and which is not otherwise an affiliated person by reason of owning a controlling interest in, being owned by, or being under common ownership, common management or common control with, the applicant.

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[1] Codified as Ch. 23, title 4 of the Code of City of White Plains.

1-1-02 *"Cable services"* means "cable services" as defined in the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 and as may be further amended from time to time (the "Cable Act"). In the event that "cable services" is no longer defined in the Cable Act or the definition of Cable Act otherwise becomes inapplicable, "cable services" shall mean "cable services" as defined in the Cable Act immediately prior to such term no longer being defined in the Cable Act or such definition otherwise becoming inapplicable.

1-1-03 *"City"* means the City of White Plains, New York.

1-1-04 *"Common council"* means the common council of the city and its designee or any successor thereto.

1-1-05 *"Control"* or *"controlling interest"* means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments or negative control, as the case may be, of the applicant or the equipment in the streets. A rebuttable presumption of the existence of control or a controlling interest shall arise from the beneficial ownership, directly or indirectly, by any person, or group of persons acting in concert, of more than ten (10) percent of any person (which person or group of persons is hereinafter referred to as "controlling person"). "Control" or "controlling interest" as used herein may be held simultaneously by more than one (1) person or group of persons.

1-1-06 *"Equipment"* means the poles, wires, electrical conductors, conduits, subways, manholes, fixtures, appliances and appurtenances that are used to provide telecommunications services.

1-1-07 *"Franchise"* means an initial authorization, or

renewal thereof, issued by the city in accordance with the provisions of this chapter which authorizes the occupation and use of the streets to provide telecommunications services.

1-1-08 *"May"* is permissive.

1-1-09 *"Mayor"* means the mayor of the city or his/her designee.

1-1-10 *"Ordinance"* means this chapter and all modifications and amendments thereto.

1-1-11 *"Person"* means any individual or any association, firm, partnership, joint venture, corporation or other legally recognized entity, whether for profit or not for profit, but shall not mean the city or the city school district of the City of White Plains.

1-1-12 *"Revocable license"* means an initial authorization or renewal thereof, issued by the city in accordance with the provisions of this chapter, which authorizes the limited occupation and use of specifically identified streets, provided that a revocable license shall be issued only in the limited circumstances set forth in section 4-23-2(b) and (g) of this chapter.

1-1-13 *"Shall"* is mandatory, not merely directive.

1-1-14 *"Streets"* means the surface of, as well as the spaces above and below, any and all streets, alleyways, avenues, highways, boulevards, driveways, bridges, tunnels, parks, parkways, public grounds or waters, and other public rights-of-way within or belonging to the city.

1-1-15 *"Telecommunications"* means all transmissions, between or among points specified by the user, of information of the user's choosing without change in the

form or content of the information as sent and received.

1-1-16 *"Telecommunications provider"* means any person who:

(1) Owns, constructs, operates or maintains equipment in the streets used to provide telecommunications services regardless of whether such telecommunications services originate or terminate in the city; or

(2) Provides telecommunications services that originate or terminate in the city by means of: (i) specifically identifiable equipment in the streets, which equipment is owned by such person or made available to such person under a lease or any other arrangement for a period longer than one hundred twenty (120) days; or (ii) equipment in the streets if the use of such equipment is continuing and substantial, and the city has determined that it is necessary and appropriate to impose the requirements of this chapter in order to preserve the application of this chapter on a competitively neutral and nondiscriminatory basis consistent with applicable law.

1-1-17 *"Telecommunications services"* means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. The term "telecommunications services" shall not include cable services.

1-1-18 *"Telecommunications system"* means the plant, equipment, real property (including interests in real property), tangible and intangible personal property, buildings, offices, furniture, customer lists, cable, wires, optical fibers, amplifier, antenna, and all other electronic devices, equipment and facilities used to provide telecommunications services.

Article 2

GRANTING AUTHORITY AND FRANCHISING PROCEDURE

Sec. 2-1. ***Granting authority***

2-1-01 No person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city. A franchise or revocable license granted in accordance with the provisions of this chapter shall not be construed to grant any rights or authorization to provide cable services in the city, and any person seeking to provide cable services in the city shall first obtain a separate franchise in accordance with applicable law.

2-1-02 Any person seeking to use the streets to construct, operate or maintain equipment to provide telecommunications for or in connection with the internal operations of such person's business, residence or employment and not for or in connection with the provision or offering of telecommunications services for sale or resale to any person in the city, shall first obtain a revocable license in accordance with the provisions of this chapter.

2-1-03 The common council may grant one (1) or more franchises and revocable licenses in accordance with this chapter, provided that the common council reserves the right to modify any provision of this chapter by amendment hereof.

2-1-04 The grant of any franchise or revocable license shall be made by adoption of a separate ordinance by the common council and shall be on such terms and conditions as shall be specified in said separate ordinance and/or a franchise or license agreement between the city and the franchisee or

licensee.

2-1-05 Any franchise or revocable license granted shall be nonexclusive. The city specifically reserves the right to grant, at any time, such additional franchises, revocable licenses or other authorizations for use of the streets by any means, as the city deems appropriate.

2-1-06 A franchise may be granted for all or any defined portion of the city.

2-1-07 A revocable license is intended to be a limited grant of authority to use and occupy specifically identified streets to provide telecommunications services and shall be granted only if:

(a) The use or occupation of such streets, together with all revocable licenses previously granted to such person and affiliated persons, shall not exceed two thousand five hundred (2,500) linear feet; or

(b) The use or occupation of such streets does not involve the offering or provision of telecommunications services to any person within the city.

In the event an application for a revocable license would cause a telecommunications provider to exceed or fail to comply with the limits specified in subsection (1) or (2) above, then such telecommunications provider must apply for a franchise in accordance with the provisions of this chapter and the use of specifically identified streets pursuant to all previously granted revocable licenses shall thereafter be pursuant to and in accordance with any such franchise that may be granted.

Sec. 2-2. ***Compliance with rules; permits required***

2-2-01 Subject to the provisions of this chapter, the city may adopt rules, policies and requirements to carry out the purposes and provisions of this chapter. Each applicant, franchisee and licensee shall comply with such rules, policies and requirements.

2-2-02 No person shall construct or install any equipment in the streets used to provide telecommunications services without first obtaining such permits or other authorizations as may be required by the city. No permits or other authorizations for such construction or installation shall be issued prior to the granting of a franchise or a revocable license pursuant to this chapter or such other authorization as may be required by applicable law.

Sec. 2-3. ***Submission of application***

2-3-01 Applications for franchises and revocable licenses shall be submitted to the commissioner of public works with a copy also to be submitted to the corporation counsel.

2-3-02 An application shall contain the following information with respect to the proposed franchise or revocable license and such other information with respect to the proposed franchise or revocable license as the city may deem necessary or appropriate, consistent with applicable law:

(i) The name, address and telephone number of the applicant and the person the city may contact concerning the application;

(ii) A description of the telecommunications services proposed to be provided, including, without limitation, a description of facilities and equipment;

(iii) A description of the proposed franchise area or in the case of a revocable license, the specifically identified streets and/or portions thereof proposed to be used;

(iv) A proposed construction schedule and sequence;

(v) A map showing the proposed location of the applicant's telecommunications system;

(vi) Proposed financing plans for the construction and operation of the telecommunications system by which the proposed telecommunications services would be provided;

(vii) A description of the legal, financial, technical and other appropriate qualifications of the applicant to hold the franchise or revocable license;

(viii) Ownership of the applicant and identification of all affiliated persons.

Sec. 2-4. ***Responsibilities of applicants***

It shall be the responsibility of each applicant for a franchise or revocable license to comply with all applicable laws, ordinances, resolutions, rules, regulations and other directives of the city and any federal, state or local governmental authority having jurisdiction.

Sec. 2-5. [Reserved for future use]

Sec. 2-6. ***Negotiation of agreement***

If an application is complete and otherwise complies with applicable law, ordinances, resolutions, rules, regulations

and other directives of the city, including the provisions of this chapter, the city shall enter into negotiations with the applicant to determine whether such applicant and the city are able to reach agreement on the terms of the proposed franchise or revocable license in accordance with sections 4-23-10 and 4-23-11 of this chapter. The city may reject any application which is incomplete or otherwise fails to comply with applicable law, ordinances, resolutions, rules, regulations and other directives of the city and any federal, state or local authority having jurisdiction.

Sec. 2-7. ***Factors for review of application***

2-7-01 In making any determination hereunder as to any application for a franchise or revocable license, the common council may consider such factors as it deems appropriate and in the public interest, provided such factors are consistent with applicable law, including without limitation:

(i) The adequacy of the proposed compensation to be paid to the city, including the value of any facilities and telecommunications services offered by the applicant to the city;

(ii) The legal, financial, technical and other appropriate qualifications of the applicant;

(iii) The ability of the applicant to maintain the property of the city in good condition throughout the term of the franchise or the revocable license;

(iv) Any services or uses of the streets that may be precluded by the grant of the franchise or revocable license; and the adverse impact of the proposed franchise or revocable license on the efficient use of the streets or utilities at present and in the future;

(v) The willingness and ability of the applicant to meet construction and physical requirements and to abide by all lawful conditions, limitations, requirements and policies with respect to the franchise or the revocable license;

(vi) The adequacy of the terms and conditions of the proposed franchise or revocable license agreement to protect the public interest, consistent with applicable law; and

(vii) Any other public interest factors or considerations that the city has a lawful right to consider and that are deemed pertinent by the city for safeguarding the interests of the city and the public.

2-7-02 Consistent with applicable law, the city may develop and implement policies and requirements to ensure that the streets have sufficient capacity reasonably to accommodate existing and future uses in a rational and efficient manner. In evaluating an applicant for a franchise or revocable license, the city may consider an applicant's proposals for addressing capacity needs and compliance with city policies and requirements.

Sec. 2-8. ***Procedure for consideration of and action on applications***

2-8-01 The common council may make such investigations and take or authorize the taking of such other steps as the common council deems necessary or appropriate to consider and act on applications for franchises and revocable licenses and to determine whether a franchise or revocable license should be granted to an applicant, and may require the applicant to furnish additional information and data for this purpose. In considering applications, the common council may seek advice from city officials, departments, agencies, boards, commissions or boards, from such other advisory

bodies as it may establish or determine appropriate, or from the public, and may request the preparation of one (1) or more reports to be submitted to the common council, which may include recommendations with respect to such applications.

2-8-02 Consist with applicable law, upon completion of the steps deemed appropriate by the common council, the common council may grant or deny the franchise or revocable license, and may specify the conditions under which the franchise or revocable license is granted.

Sec. 2-9. ***Terms and conditions of franchise***

2-9-01 The terms and conditions applicable to any franchise granted pursuant to this chapter shall be set forth in the separate ordinance granting the franchise and/or in a separate written agreement. A franchise granted pursuant to this chapter shall not become effective until said separate ordinance becomes effective and any separate agreement is executed by both parties. Such separate ordinance or written agreement, among other things, shall address the following subjects:

(i) The term of the franchise;

(ii) The franchise area and the telecommunications services to be offered;

(iii) The compensation to be paid to the city, which shall include the payment of fees and/or the provision of facilities or services;

(iv) The circumstances upon which the franchise may be terminated or cancelled;

(v) The mechanisms, such as performance bonds, security

funds or letters of credit, to be put in place to ensure the performance of the franchisee's obligations under the franchise;

(vi) The city's right to inspect the facilities and records of the franchisee;

(vii) Insurance and indemnification requirements applicable to the franchisee;

(viii) The obligation of the franchisee to maintain complete and accurate books of account and records, and the city's inspection rights with respect thereto;

(ix) Provisions to ensure quality workmanship and construction methods;

(x) Provisions to ensure that the franchisee will comply with all applicable city, state and federal laws, regulations, rules and policies;

(xi) The obligation of the franchisee to supply an engineering site plan showing the proposed location of the applicant's telecommunications system, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosure, and the relationship of the system to all existing poles, utilities, sidewalks, pavement, telecommunications systems, and other improvements in the streets, all of which shall be subject to approval by the appropriate city departments;

(xii) Provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the city;

(xiii) Remedies available to the city to protect the city's interest in the event of the franchisee's failure to comply with terms and conditions of the franchise;

(xiv) Provisions to ensure that the franchise will obtain all

necessary licenses and permits from, and comply with, all laws, regulations, rules and policies of any governmental body having jurisdiction over the franchisee, including the Federal Communications Commission;

(xv) Provisions to ensure that the franchisee will protect the property of the city and the delivery of public services from damage or interruption of operations resulting from the construction, operation, maintenance, repair or removal of improvements related to the franchise;

(xvi) Provisions designed to minimize the extent to which the public use of the streets of the city are disrupted in connection with the construction of improvements relating to the franchise; and

(xvii) Such other provisions as the city determines are necessary or appropriate in furtherance of the public interest, consistent with applicable law.

Sec. 2-10. ***Terms and conditions of revocable license***

2-10-1 The terms and conditions applicable to any revocable license granted pursuant to this chapter shall be set forth in the separate ordinance granting the revocable license and/or in a separate written agreement. A revocable license granted pursuant to this chapter shall not become effective until the separate ordinance granting the license becomes effective and any separate written agreement is executed by both parties. Such separate ordinance and/or written agreement shall address the same subjects listed in section 4-23-10 of this chapter subject to the following limitations:

(i) The revocable license shall be for a term not to exceed ten (10) years from the date that the ordinance granting the revocable license becomes effective;

(ii) The revocable license shall be revocable at any time by the city for cause or for the city's purposes; and

(iii) The revocable license, together with all revocable licenses previously granted to the applicant or affiliated persons, shall not authorize the occupation and use of more than two thousand five hundred (2,500) linear feet of specifically identified streets, unless the use or occupation of the streets does not involve the offering or provision of telecommunications services to any person in the city.

In the event an application for a revocable license would cause a telecommunications provider to exceed or fail to comply with the limits specified in section 4-23-11(3) of this chapter, then such telecommunications provider must apply for a franchise in accordance with the provisions of this chapter and the use of specifically identified streets pursuant to all previously granted revocable licenses shall thereafter be pursuant to and in accordance with any such franchise that may be granted.

Article 3

GENERAL PROVISIONS

Sec. 3.1 *Severability*

If any section, subsection, sentence, clause, phrase or other portion of this Ordinance is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct and independent portion. Such declaration shall not affect the validity of the remaining portions hereof, which other portions shall continue in full force and effect.

Sec. 3.2 *Delegation*

The Common Council shall have the right to delegate and

redelegate, and to revoke any such delegation or redelegation, from time to time, any of its rights or obligations under this Ordinance to any body, organization or official of the City. Any such delegation, redelegation or revocation, no matter how often made, shall not be deemed an amendment to this Ordinance or to require the consent of any applicant for a Franchise or Revocable License or franchisee or license.

POST-ARGUMENT QUESTIONS ADDRESSED BY THE SECOND CIRCUIT TO THE FCC (JANUARY 29, 2002)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007
(212) 857-8500 TELEPHONE
(212) 857-8710 FACSIMILE

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

January 29, 2002

Rodger D. Citron, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: *TCG New York, Inc., et al. v. City of White Plains*, 01-7213 Date of Argument: December 3, 2002

Dear Mr. Citron:

The court requests that the Federal Communications Commission offer its views on the following issues at they pertain to the case under review:

(1) Under 47 U.S.C. § 253(d), does the Commission have exclusive, concurrent (with a United States District Court), or no jurisdiction to enforce against a local government the provisions of 47 U.S.C. § 253(a)?

(2) Whenever the Commission enforces section 253(a) against a local government, does it have jurisdiction to adjudicate the local government's section 253(c) defense to a section 253(a) violation?

(3) (a) In the pending case, is the City's imposition of a five percent annual franchise fee, based on gross revenue, "fair and reasonable compensation" for "use of public rights-of-way" within the meaning of section 253(c), wholly apart from whether the fee is "competitively neutral and nondiscriminatory?" (b) if not, is "fair and reasonable compensation" limited to a local government's reimbursement for its costs? (c) If "fair and reasonable compensation" is not limited to a local government's reimbursement for its costs, what criteria are to be used to determine whether a local government's charge is "fair and reasonable compensation?"

The maximum length of the brief shall be 20 double-spaced pages. Counsel for the FCC should submit its brief no later than February 25, 2002.

I have enclosed copies of the briefs that were filed in this case.

Thank you.

Very truly yours,

/s Roseann B. MacKechnie

EXCERPTS FROM THE CITY'S AUGUST 1999 PROPOSED FRANCHISE AGREEMENT

2. FRANCHISE GENERAL CONDITIONS

* * *

2.7 Educational and Governmental Rates. During the term of this Agreement, **THE COMPANY** shall always treat the **CITY** and elementary and secondary educational institutions in the **CITY** as "most favored vendees". To that end, if the **CITY** or the elementary or secondary educational institutions in the **CITY** shall desire to contract for the purchase, lease or other use of any Services, facilities or equipment provided by **THE COMPANY** or any Affiliated Party, **THE COMPANY** shall, subject to applicable law, offer the **CITY** and the elementary and secondary educational institutions in the **CITY** contract terms and conditions no less favorable than the most advantageous terms and conditions offered any of **THE COMPANY**'s governmental agencies and non-profit organizations for similar or identical transactions within Westchester County. The **CITY** and **THE COMPANY** agree that any capital expenditures, costs or expenses incurred in connection with connecting to **THE COMPANY**'s cost to the **CITY** and/or elementary and secondary educational institution provided that **THE COMPANY** shall document its costs and figures therefor.

3. REPRESENTATIONS, WARRANTIES AND COVENANTS

3.1 Representations by **THE COMPANY**. **THE COMPANY** makes the following representations, warranties and covenants as the basis for the benefits and obligations contained in this Agreement:

* * *

(4) **THE COMPANY** represents and warrants that it is not prohibited from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement; that the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of and compliance with the provisions of this Agreement will not conflict with, or constitute a breach of or a default under, any of the terms, conditions, or provisions of any law, any order of any court or other agency of government having jurisdiction, or any contractual limitation, or outstanding trust indenture, deed of trust, mortgage, loan agreement, other evidence of indebtedness or any other agreement or instrument to which **THE COMPANY** or any Affiliated Person is a party or by which it or any of its property is bound, or result in a breach of or a default under any of the foregoing; and that this Agreement is the legal, valid and binding obligation of **THE COMPANY** enforceable in accordance with its terms, except as it may be rendered unenforceable by reason of bankruptcy or other similar laws affecting creditors' rights and the applicability of provisional or equitable remedies.

* * *

8. COMPENSATION TO THE CITY

8.1 (a) Franchise Fee. As compensation for the rights and privileges granted by this franchise, **THE COMPANY** shall pay to the **CITY** an annual fee equal to five (5%) percent of Gross Revenues. The payments of the aforesaid fees shall in no way be construed to include the payment of real estate taxes to the **CITY** nor shall such

franchise fee constitute a deduction from Gross Revenues for the purposes of computing the amount of franchise fee due.

8.1(b) Minimum Annual Fee. Notwithstanding the fee calculation method set forth in Section 8.1(a) above, **THE COMPANY** shall pay to the **CITY** a minimum annual Franchise Fee unless the calculation required by Section 8.1(a) hereinabove results in a payment greater than the Minimum Annual Fee set forth herein. Such fee shall be Five Thousand Dollars ($5,000.00) for the year 1999 and shall increase by ten (10%) percent per year until it reaches Eight Thousand Dollars ($8,000.00) in the sixth (6th) year (2004). The minimum annual fee shall remain at Eight Thousand Dollars ($8,000.00) per year until the fifteenth (15th) year, when upon renewal of the franchise term under the terms and conditions set forth herein, said annual minimum fee shall increase to Ten Thousand Dollars ($10,000.00) per year for each year thereafter for the duration of the renewal term of this Agreement.

8.1(c) Franchising and Other Costs. **THE COMPANY** has, prior to the execution of this Agreement, paid a portion of the costs, if any, the **CITY** incurred for the services of third parties (including, without limitation attorneys and other consultants) in connection with the award of this Franchise. Within thirty (30) days after receipt from the **CITY** of an invoice, **THE COMPANY** shall pay to the **CITY** or, at the direction of the **CITY**, to a third party, the remaining costs, if any, the **CITY** incurred for the services of third parties (including, without limitation, attorneys and other consultants) in connection with the award of this Franchise. **THE COMPANY** shall pay at such time and in such manner as the **CITY** shall specify to the **CITY** or, at the direction of the **CITY**, to third parties an amount equal to the costs the **CITY** incurs for the services of third parties (including but not limited to attorneys and other

consultants) in connection with any renewal, renegotiation, transfer, amendment or other modification of this Agreement or the Franchise.

8.1(d) No Credits or Deductions. No Credits or Deductions. The compensation and other payments to be made pursuant to this Section 8 shall not be deemed to be in the nature of a tax and shall not be deducted from Gross Revenue, and shall be in addition to any and all taxes or other fees or charges that **THE COMPANY** shall be required to pay to the **CITY** or to any state or federal agency or authority, all of which shall be separate and distinct obligations of **THE COMPANY**. **THE COMPANY** shall comply with the applicable provisions of Section 600 of the New York State Real Property Tax Law, and agrees to waive the tax credits available under Section 626 of the Real Property Tax Law.

8.2 As additional compensation to the **CITY** for use of the Streets, and to minimize disruption caused by repeated construction in the Streets and promote efficient management and use of the Streets, **THE COMPANY** at its own cost and expense shall install one thousand feet of conduit for the **CITY** at points where its Fiber Optic Network overlaps the **CITY**'s fiber optic system currently under construction. In addition, **THE COMPANY** agrees to install additional conduit for municipal purposes along its Fiber Optic Network for which the **CITY** will reimburse **THE COMPANY** for the cost of materials. "Municipal purposes" shall mean only those purposes that are governmental in nature. In no event shall the **CITY** use any conduit installed by **THE COMPANY** for the **CITY**'s use for any purpose that shall be commercial in nature or that shall result in the **CITY** providing conduit capacity or services in competition with **THE COMPANY**.

Notwithstanding anything herein to the contrary, **THE COMPANY**'s conduit installation obligations for the benefit of the **CITY** in this Section 8.2 shall be applicable only in the event that the **THE COMPANY** shall engage in new construction to install conduit for **THE COMPANY**'s own use pursuant to this Agreement. "New construction" shall mean that **THE COMPANY** shall excavate or dig in the streets to install its conduit under the Streets.]

8.3 Payments. Once the Fiber Optic Network is operational, the amount of the payments of the franchise fees due and payable only by **THE COMPANY** shall be computed bi-annually for the preceding six (6) months as of March 1 and September 1, of each calendar year, and such payment amount shall be due and payable to the **CITY** no later than thirty (30) days after the 1st day of Mach and the 1st day of September of each year. In the event the first year of any year of operation is less than twelve (12) calendar months, the Franchise Fees shall still be payable on March 1st and/or September 1st of that year. **THE COMPANY** shall submit bi-annual reports certified by an officer of **THE COMPANY** in conjunction with each payment setting forth the basis for computation of such payment.

8.4 Documentation. Each payment shall be accompanied by a bi-annual report certified by an officer of **THE COMPANY** showing the basis for the computation and such other relevant facts as the **CITY** may require. A bi-annual report certified by an officer of **THE COMPANY** documenting franchise fee payments or other compensatory payments shall be submitted to the **CITY**. All such documents shall be considered to constitute trade secrets and shall be treated in accordance with such classification.

8.5 Examination. Upon reasonable written notice by a duly authorized official of the **CITY** to **THE**

COMPANY, the **CITY** or its representatives shall have the right to examine any officer of, and audit documents of, **THE COMPANY** or **THE COMPANY**'s parent or an Affiliated Party as to the correctness, completeness or accuracy of any record or report with respect to the payment of franchise fees to the City.

8.6 Conditions of Acceptance. No acceptance of any payment shall be construed as an accord that the payment is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the **CITY** may have for further or additional sums payable under the provisions of this franchise. It is the understanding of the parties hereto that this Agreement shall not cause the **CITY** to expend any monies hereunder. **THE COMPANY** shall have no right to offset, or otherwise receive credit for, the franchise fees **THE COMPANY** shall be obligated to make to the **CITY**, including, without limitations, real estate taxes.

* * *

11. CONSTRUCTION

* * *

11.9 Fiber Optic Network Locations. To minimize disruption and inconvenience to the public, and to promote efficient use of the Streets, the Fiber Optic Network shall, to the extent feasible, be constructed in the Streets in accordance with this Agreement and applicable law. If the Fiber Optic Network is installed on private property, **THE COMPANY** shall secure the permission of the owner thereof.

* * *

d. Notwithstanding the foregoing or anything else in this Agreement, **THE COMPANY** must obtain the approval of the **CITY** regarding the location of any and all parts of the Fiber Optic Network prior to construction.

12. RECORDS AND REPORTS

12.1 Maintenance and Inspection of Records. **THE COMPANY** shall, at all times, maintain complete and accurate books of account and records of its business and operations and all other records required by this franchise. Upon no less than three (3) business days' notice, **THE COMPANY** shall allow the **CITY** to inspect and/or audit accounting and financial records of **THE COMPANY** or any Affiliated Person with respect to the Fiber Optic Network, its construction, operation and maintenance, and **THE COMPANY**'s obligations pursuant to this Agreement. Any audit by the **CITY** hereunder shall be at its expense unless such audit shall disclose an underpayment of more than three (3%) percent of the total franchise fees payable during the period of the audit, in which event **THE COMPANY** shall reimburse the **CITY** for the expense of such audit. If, as a result of such an audit, an underpayment is discovered in an amount greater than three (3%) percent of the franchise fee due for any given period, there shall be a penalty imposed equal to one and one half (1½%) percent of the underpaid amount, compounded monthly, until such amount is paid in full.

12.2 Location of Records. Insofar as practicable, the records set forth above shall be maintained at **THE COMPANY**'s office located at _____, or such other address as **THE COMPANY** may designate. Any records

not maintained there shall be made available to the **CITY** at such local business office upon request affording reasonable notice therefore.

12.3 Location of Facilities. A mapped description of the major physical elements of the Fiber Optic Network shall be submitted to the **CITY**, and a revised and corrected version thereof shall be submitted on or before December 31 of each year. All locations are to be approved by the Commissioner of Public Works and the Commissioner of Traffic of the **CITY**.

13. MISCELLANEOUS

* * *

13.6 Acceptance and Acknowledgement. **THE COMPANY** acknowledges that it has carefully read, understands and accepts without reservation the obligations imposed by the terms and conditions herein. **THE COMPANY** further agrees that as of the effective date of this Agreement, the terms and conditions of this Agreement are lawful, valid and enforceable under applicable law, and that **THE COMPANY** will not, at any time in any forum, seek or void or challenge, under applicable law as in effect on the effective date of this Agreement, any terms or conditions contained herein or the processes or procedures pursuant to which this Agreement was entered. Nothing contained herein is to be construed so as to prevent **THE COMPANY** from contesting any determination of the **CITY** in connection with this Agreement. All lawsuits commenced by the parties shall be in courts located in Westchester County or before the Federal Communications Commission in the event the Federal Communications Commission shall have jurisdiction over the disputed issue.

14. CHANGE OF CONTROL, ASSIGNMENT, ETC.

14.1 Assignments, Etc. Neither the franchise, nor any rights or obligations of **THE COMPANY** in the Equipment of the Fiber Optic Network or pursuant to this Agreement, nor any part of the capacity of the Equipment or the Fiber Optic Network, shall be encumbered, assigned, sold, transferred, pledged, leased, sublet or mortgaged in any manner, in whole or in part, to any Person, nor shall title therein, either legal or equitable, or any right or interest therein, pass to or vest in any Person, either by act or **THE COMPANY** or any Affiliated Person, by act of any Person holding Control of or any interest in **THE COMPANY**, Equipment or franchise, by operation of law, or otherwise, without the prior written consent of the **CITY**, provided that the **CITY** shall consider any such action in accordance with the usual procedural rules and the procedures set forth in Section 14.3.

No change in Control of **THE COMPANY** or the franchise shall occur after the Effective Date, without the prior written consent of the **CITY** granted pursuant to the procedures set forth in Section 14.3. The requirements of this Section 14.1 shall also apply whenever any change is proposed of twenty percent (20%) or more of the ownership or Control of **THE COMPANY**, the franchise or any Person holding control of **THE COMPANY** or the franchise. In the event that twenty percent (20%) or more of the ownership of **THE COMPANY** or the Franchise or any Person holding Control of **THE COMPANY** or the Franchise is transferred by the acquisition of publicly traded stock by a Person or Persons acting in concert without that Person or Persons having any agreement, arrangement or understanding for the purpose of acquiring, holding, voting or disposing of such stock with **THE COMPANY**, any Affiliated Person or any Person holding Control of **THE COMPANY** or any

Affiliated Person, then **THE COMPANY** shall be required to apply to the Common Council within 30 days of the date **THE COMPANY** becomes aware that such a transfer has occurred for consent to the transfer of ownership. Nothing herein shall be construed as suggesting that a proposed change of less than twenty percent (20%) does not require consent of the **CITY** (acting pursuant to the procedures set forth in Section14.3 if it would in fact result in a change in Control of **THE COMPANY** or the franchise), and any other event that could result in a change in ownership or Control of **THE COMPANY**, regardless of the manner in which such ownership or Control is evidence (e.g. stock, bonds, debt instruments or other indicia of ownership or Control).

14.2 Transfer Prior to Completion. In the event that prior to the date that the Fiber Optic Network is operational, **THE COMPANY** wishes to transfer a Controlling Interest in **THE COMPANY** to a person or entity for the sole purpose of financing the construction and associated expenses of the Fiber Optic Network, then the **CITY** may require: (i) **THE COMPANY** to demonstrate to the **CITY** that the sole purpose of the transfer is for financing the construction and associated expenses of the Fiber Optic Network; (ii) **THE COMPANY** to comply with the procedure set forth in Section 14.3 and to certify that it is not in default under this Agreement; and (iii) the person or entity acquiring the Controlling Interest in **THE COMPANY** to execute a guarantee of completion in favor of the **CITY**, which guarantees by the date stated in the guarantee of completion that the Fiber Optic Network will be operational, or said person or entity shall pay the **CITY** Fifty Thousand Dollars ($50,000.00) as liquidated damages.

14.3 Transfer Procedure. Provided **THE COMPANY** is not in default under this Agreement and there

are no outstanding violations of the Agreement and **THE COMPANY** wishes to transfer, sell or assign pursuant to Section 14.1 herein, then **THE COMPANY** shall give **CITY** a notice of intent or may petition or request the Common Council to determine that no change of control has occurred and no consent of the Common Council is required for the proposed transfer or approval of the change in ownership by publicly traded stock acquired without any agreement with **THE COMPANY** or the ownership or Control of **THE COMPANY**. **THE COMPANY**'s notice or petition shall be accompanied by all of the following, which are applicable:

(a) A copy of the proposed agreements between **THE COMPANY** and the proposed transferee or assignee;

(b) an agreement from the proposed transferee or assignee assuming the provisions of this Agreement;

(c) a statement setting forth in reasonable detail the identify of the proposed assignee or transferee and the nature of its business; and

(d) current financial information with respect to the proposed assignee or transferee to demonstrate that the proposed assignee or transferee has the financial resources necessary to perform the obligations of **THE COMPANY** under this Agreement.

(e) a petition describing the proposed action and **THE COMPANY**'s argument as to why the action would not involve a change in Control of **THE COMPANY**. **THE COMPANY** shall provide the **CITY** with: (i) additional information or documents reasonably

requested by the **CITY** and related to the obligations of this Agreement and/or the **CITY**'s authority to manage the Streets and require fair and reasonable compensation, consistent with applicable law; and (ii) an opportunity to meet and interview the proposed assignee or transferee and (iii) if **THE COMPANY** has petitioned the **CITY** for a determination an action would not be a change in Control of **THE COMPANY**, **THE COMPANY** shall submit the documents required under this Agreement for approval of a change in Control of **THE COMPANY**.

In the event that **THE COMPANY** complied with the foregoing, the **CITY** shall not unreasonably withhold its consent so long as:

(i) **THE COMPANY** shall have paid the **CITY** any reasonable costs incurred by the **CITY** to review the requested consent, including, without limitation, attorney's fees;

(ii) the proposed assignee or transferee is a reputable entity and the **CITY** has been furnished with reasonable proof thereof;

(iii) the proposed assignee or transferee is of sound financial condition as reasonably determined by the **CITY** given the obligations to be assumed by the proposed assignee or transferee;

(iv) the proposed assignee or transferee agrees to enter into an agreement approved by the **CITY**, which assumes the obligations under this Agreement; and

(v) each other Person involved in any action described in Section 14.1 agrees to enter into an

agreement containing such conditions as may be reasonably specified by the **CITY**.

* * *

16. **GUARANTY.**

16. Guaranties. This agreement is subject to the **CITY** being provided an executed guaranty by **TELEPORT COMMUNICATIONS GROUP, INC.** of the obligations of **THE COMPANY**, its wholly-owned subsidiary, hereunder in a form satisfactory to the Corporation Counsel of the **CITY** which guaranty must remain in effect during the entire term of this Agreement and the **CITY** being provided a secondary guaranty by **AT&T CORP.** of the obligations of **THE COMPANY** and **TELEPORT COMMUNICATIONS GROUP, INC.** its wholly owned subsidiaries, hereunder in a form satisfactory to the Corporation Counsel of the **CITY** which secondary guaranty must remain in effect during the entire term of this Agreement.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

December 2, 2002

Mr. William Malone
Miller & Van Eaton, #1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036-4306

Re: City of White Plains, New York
v. TCG New York, Inc., et al.
Application No. 02A452

Dear Mr. Malone:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on December 2, 2002, extended the time to and including January 10, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s
Jeffrey D. Atkins
Assistant Clerk

1e

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

NOTIFICATION LIST

Mr. William Malone
Miller & Van Eaton, #1000
1155 Connecticut Avenue, N.W.
Washington, DC 20036-5406

Mr. Stephen B. Kinnaird
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Washington, DC 20005

Mr. Robert G. Scott Jr.
Cole, Raywid & Braverman
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Washington, DC 20006

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

FILED
FEB 14 2003

No. 02-1062

IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents

* Counsel of Record

February 14, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 253(a) preempts only those state and local legal barriers to entry that absolutely exclude a telecommunications carrier from the market.

2. Whether a court may analyze a municipal ordinance as a whole in determining whether it creates a barrier to entry that is preempted under 47 U.S.C. § 253(a).

3. Whether it is competitively neutral and nondiscriminatory for a municipality to create a structural pricing advantage for incumbents in head-to-head competition with new entrants by demanding that a new entrant (but not the incumbent) pay a franchise fee of 5% of its gross revenues to the municipality.

4. Whether a municipal ordinance that grants city officials unfettered discretion to deny franchises to new entrants on any "public interest" factor unrelated to right-of-way management or fair and reasonable right-of-way compensation is consistent with 47 U.S.C. § 253(c), when no such rule applies to incumbents.

5. Whether a municipal ordinance that grants city officials unfettered discretion to prohibit corporate or franchise transfers by new entrants for reasons not limited to right-of-way management or fair and reasonable right-of-way compensation is consistent with 47 U.S.C. § 253(c), when no such rule applies to incumbents.

STATEMENT REQUIRED BY RULE 29.6

There are three respondents – TCG New York, Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY – which collectively will be referred to in this brief as "TCG." Respondent Teleport Communications d/b/a TCNY, a New York general partnership, is owned by TC New York Holdings, Inc. (2.7%) and TC New York Holdings II, Inc. (97.3%), both of which are 100% owned by Teleport Communications Group Inc. Respondents TCG New York, Inc. and TC Systems, Inc. are also 100% owned by Teleport Communications Group Inc., which is 100% owned by AT&T Corp. No other publicly held corporation owns more than 10% of AT&T's stock.

All parties to the proceeding are listed in the caption of the case.

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INTRODUCTION

The petition for certiorari filed by the City of White Plains ("City" or "Petitioner") presents no issue worthy of this Court's review. There is no circuit split that can be resolved by review of the judgment below; this case is not a proper vehicle for deciding most of those issues; and the decision of the United States Court of Appeals for the Second Circuit was indubitably correct. Indeed, the only way the City can challenge this decision is by misstating or steadfastly ignoring the facts which are undisputed and which were stipulated. This Court should deny the petition.

STATEMENT OF THE CASE

A. Legislative Background

In the landmark Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act" or the "1996 Act"), Congress "ended the longstanding regime of state-sanctioned monopolies" in local phone service. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The Act creates "'a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.'" *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630, 637 (2nd Cir. 1999) (omission in original) (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996)); *Public Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3461 (¶ 1) (1997) ("*Texas Preemption Order*"), *petition for review denied*, 164 F.3d 49 (D.C. Cir. 1999).

"The 1996 Act both prohibits state and local regulation that impedes the provision of 'telecommunications services,' § 253(a), and obligates incumbent carriers to allow competitors to enter their local markets, § 251(c)." *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1662 (2002)

(footnote omitted). This case concerns the first of these statutory provisions. Entitled "Removal of barriers to entry," section 253 provides that no state or local statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). "Through this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states ...." *Texas Preemption Order* at 3463 (¶ 4).

Congress exempted from the general proscription of section 253(a) two kinds of regulatory actions. See *id.* at 3481 (¶¶ 43-45). First, in section 253(b), Congress preserved the authority of the States "to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). Second, in section 253(c) – the provision at issue here – Congress more narrowly preserved the authority of state or local governments "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." *Id.* § 253(c).

Thus, section 253 was designed to level the competitive playing field previously monopolized by incumbent local exchange carriers – such as Verizon – by requiring that any state or local regulation of right-of-way access henceforward be "competitively neutral" and "nondiscriminatory." *Id.* § 253(b), (c). By so limiting state and municipal power, "'Congress intended primarily for competitive markets to

determine which entrants shall provide telecommunications services demanded by consumers,'" and sought to preclude an obstructionist "'third tier'" of municipal regulation that would raise the cost of entry and distort the market in favor of certain carriers. *TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21440, 21441 (¶¶ 102, 105) (1997); *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

B. The Stipulated Facts Below

This case was decided on stipulated facts. The actions of the City of White Plains epitomize the very abuses that section 253 was enacted to prevent. The City here sought to extract tribute from new entrants but not from politically powerful incumbents like Verizon. The stipulated facts are ignored in the Petition, for they illustrate that this case does not present the questions that the City has framed. In particular, despite the misleading impression that the City attempts to create, it is not the case that only a few months passed between TCG's request for right-of-way access and this lawsuit. Pet. 10-11. As both the court of appeals and the district court concluded, there were "extensive delays in processing TCG's request for a franchise," and the combinations of these delays and the onerous requirements imposed on TCG "effectively prohibited" it from providing telecommunications services in White Plains. Pet. App. 15a, 39a ("the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains"). Moreover, the stipulated facts demonstrate that the City's differing treatment of TCG and the incumbent monopolist Verizon was the antithesis of competitive neutrality.

1. TCG's Franchise Negotiations

TCG provides telecommunications services in competition with (among others) incumbent local exchange carriers like

Verizon. It does so primarily by constructing and operating its own fiber optic networks. TCG first requested permission to install facilities in the City's right-of-way in January, 1992, and it made formal applications in 1992 and 1994, "regularly communicating with City representatives in an attempt to obtain the City's consent." Pet. App. 29a. The City demanded that TCG enter into a franchise agreement modeled on agreements it had negotiated with other carriers that, among other things, demanded a franchise fee of 5% of gross annual revenues from operations in White Plains. Because the City remained steadfast in its demands as the parties negotiated over agreement terms, TCG was continually denied access to the City's rights-of-way both before and after the Act was passed in February, 1996.

On December 1, 1997, the City enacted an ordinance entitled "Telecommunications Franchising and Licensing" ("Ordinance") in response to the Act's passage. Pet. App. 1b. The central provision of the Ordinance is section 2-1-01, which provides that "[n]o person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city." *Id.* at 5b. Under the Ordinance, both a franchise and a revocable license authorize a telecommunications provider to occupy and use the streets, but the latter is issued only when the occupation or use does not exceed 2,500 linear feet or does not involve the offering or provision of telecommunications service to any person within the City. *Id.* at 4b, 14b. The Ordinance provides that a prospective provider submit a formal application and negotiate terms of a franchise agreement with City officials, subject to approval by the City council. *Id.* at 7b-13b.

The Ordinance imposes many requirements that have nothing to do with management, or compensation for use, of the City's streets. For example, the Ordinance requires applicants to submit a description of the telecommunications

services that they propose to provide. Pet. App. 7b. The City has since *stipulated* that this information "is not directly related to the applicant's physical occupation of the public rights-of-way." C.A. App. A-184. Moreover, the Ordinance grants the Council unfettered discretion to deny franchises based on "the public interest, consistent with applicable law," and to weigh "[a]ny other public interest factors or considerations that the city has a lawful right to consider and that are deemed pertinent by the city for safeguarding the interests of the city and the public." Pet. App. 10b.

The Ordinance provides that a separate franchise ordinance or agreement "shall address" certain subjects, many of which again are not limited by their terms to right-of-way management – such as recordkeeping and inspection obligations, transfer restrictions, and "[s]uch other provisions as the city determines are necessary or appropriate in furtherance of the public interest, consistent with applicable law." Pet. App. 11b-13b. The Ordinance also requires that the franchise address the compensation to be paid the City, but does not specify a formula or rate of compensation, thus leaving that to be negotiated. *Id.* at 11b. The Ordinance grants the City absolute discretion to discriminate in favor of the incumbent, permitting city officials "[t]o the extent permitted by law, [to] determine to apply all or certain provisions of this Ordinance to Telecommunications Providers and Franchises and other right-of-way authorizations existing on the effective date of this Ordinance." C.A. App. A-471.[1]

Negotiations of a franchise agreement between TCG and the City continued after the passage of the Ordinance, and it is on these negotiations that the court of appeals relied. Pet. App. 4a. In April of 1998, TCG submitted an application for

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[1] The City omits this legal sanction to discriminate among telecommunications providers in reproducing the Ordinance in Appendix B of its Petition. *See* Pet. App. 1b-15b.

a revocable license, which the City never acted upon. *Id.*; C.A. App. A-185-86.

In June, 1998, the City's Corporation Counsel advised TCG that it should apply for a franchise rather than a license, and forwarded a copy of the City's recent franchise agreement with Metromedia Fiber Networks, Inc. ("MFN"). C.A. App. A-186-87. Despite the 1996 Act's preemption of municipal regulatory authority, the MFN Agreement that the City proposed as a basis for negotiations was not materially different from the City's franchise agreements antedating the Act. Cf. *id.* at A-382-428. The Counsel characterized franchise agreements as "'business deals'" between the City and the carriers. *Id.* A-187.

In August of 1998, TCG provided comments on the MFN agreement as a basis for negotiations, but expressly reserved its right to challenge the lawfulness of the Ordinance and proposed agreement under the 1996 Act and state law. C.A. App. A-187. As the City delayed action, TCG continued to press for access to the right-of-way because it was losing business opportunities with major potential customers like Pepsi and IBM. *Id.* at A-189. On February 10, 1999, TCG again submitted an application for a franchise to the City. *Id.* at A-190. Negotiations over draft agreements continued, but the City took the position that its franchise fee should be calculated not on TCG's gross revenues, but on the combined gross revenues of TCG and its affiliate AT&T. *Id.* at A-191, A-193. On May 4, 1999, the City presented a draft franchise agreement between the City and TCG ("May Proposal") that reflected the City's demands. *Id.* at A-194. It was stipulated below that TCG cannot construct telecommunications facilities in the City's public rights-of-way, or offer or provide telecommunications services in the City, because of the City's franchise requirements. *Id.* at A-189 ¶ 70.

2. The City's Decision Not To Require A Franchise, Or Impose Franchise Fees Or Restrictions, On Verizon

Even as it denied TCG entry into the White Plains market by requiring a franchise with prohibitive terms and fees, the City steadfastly refused to apply the Ordinance to TCG's principal competitor, Verizon, or to impose remotely comparable franchising requirements upon it. The City refused to do so even though the Ordinance unequivocally covered Verizon, for the central prohibition of the Ordinance is that "[n]o person shall use or occupy the streets as a telecommunications provider, or construct, operate or maintain equipment in the streets used to provide telecommunications, without a franchise or revocable license granted by the city." Pet. App. 5b. In reliance on the Ordinance provision allowing it unfettered discretion to exempt carriers of its choice, the City has not required Verizon to obtain a franchise in order to occupy the municipal right-of-way or to provide telecommunications services in White Plains. The City also has not required Verizon to pay any franchise fee, much less 5% of its gross revenues (or those of its affiliates) from its operations in White Plains. C.A. App. A-198, A-200.

Verizon has by far the largest network of poles and underground conduit in White Plains of any telecommunications provider. C.A. App. A-201. Beginning in 1919, Verizon began providing the City with free conduit for various municipal communications needs (including police and fire communications and traffic control). *Id.* at A-198, A-201. The City constructed a fiber optic network in the early 1990's for municipal uses. *Id.* at A-201. Eleven miles of the City's 31-mile network is located in Verizon conduit. *Id.* The majority (perhaps 75%) of that conduit, and a much higher percentage of conduit underlying the main thoroughfares, was built prior to 1990; many of the later

additions were in outlying areas or in short sections. *Id.* at A-199.

The City stipulated that it has never calculated the value to it of the conduit that Verizon provides, or the cost of constructing (or leasing) the same amount of conduit. C.A. App. 199. It further stipulated to no knowledge of the original or incremental cost to Verizon of providing or maintaining that conduit, or of the depreciated value to Verizon of the conduit. *Id.* There is nothing unique about the facilities Verizon has placed in the right-of-way; they are the same as other carriers use, and (other things being equal) Verizon's installation of facilities and occupation has an impact on the right-of-way no different from that of other carriers. Indeed, the City admitted it has never compared the difference in impact on the rights-of-way of Verizon vis-à-vis other carriers, even though it acknowledged that the life of its streets was impaired when Verizon constructed its network. *Id.* at A-199-201.

Verizon receives other preferences from the City as well. The City has a Street Cut Ordinance requiring telecommunications providers to obtain and maintain insurance, and to provide a monetary deposit (10% of which the City retains as a fee). The City does not require Verizon to obtain and maintain insurance or to deposit any money, and extracts no fees for its construction in the right-of-way. C.A. App. A-200-01.

The City maintains before this Court that the City entered into a "regulatory compact" with Verizon that had "a heavy universal service component," by which "[i]n return for access to the City's rights-of-way, the company undertook an obligation to extend telephone service to the taxpayers of the City." Pet. 24-25. That is a fiction; the claimed compact is no part of the stipulated facts and could not be considered in any event; and it is wrong as a matter of law. See *infra* at 23. Indeed, the City Council minutes in the record (from 1919 and 1954) reflect that the only *quid pro quo* for Verizon's

access to the City's rights-of-way was the provision of free conduit space for the City's police and fire communications systems and (at the time) discounted rates on municipal service. C.A. App. A-1149-53.

C. Proceedings Before The District Court

Because the City's May Proposal established the futility of further discussions, on June 18, 1999 TCG filed an action for declaratory and injunctive relief against the City in the United States District Court for the Southern District of New York. The complaint alleged violations of state and federal law and challenged various provisions of the Ordinance and of the May Proposal, and their discriminatory application to TCG but not Verizon. After the district court directed the parties to attempt to settle their differences, the City proposed a new agreement (the "August Proposal") that eliminated only certain of the offensive provisions of the prior proposed agreement. Pet. App. 5a-7a; *id.* at 1d-13d.

Based on the stipulated facts, the district court ruled that some (but not all) of the challenged provisions of the Ordinance and the August Proposal violated federal law. Addressing first TCG's claims under the 1996 Act, the district court held that

> the question of whether the City's actions violate § 253 of the [Act] involves a two-step analysis: (i) whether the City's regulations "prohibit or have the effect of prohibiting" the ability of TCG to provide telecommunications services under § 253(a), and (ii) if so, whether they are "saved" under § 253(c).

Pet. App. 36a. Adopting the statutory interpretation of the FCC, *Petition of the State of Minn.*, 14 F.C.C.R. 21697, 21704 (¶ 11) n.26 (1999), the district court imposed upon TCG the burden of proving that the City had violated section 253(a), whereupon the burden would shift to the City to justify its actions as within section 253(c). Pet. App. 40a n.5.

The district court held that "[a]ny process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local government decisionmakers to grant or deny permission to use the public rights-of-way has the effect of prohibiting service." Pet. App. 38a (internal quotation marks omitted). The district court held that TCG had satisfied its burden of proving a violation of section 253(a) because "the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains." *Id.* at 39a.

In regard to requirements other than fees, the district court held that all but three of the challenged provisions exceeded the "circumscribed scope of activities," Pet. App. 43a, that the FCC had identified as within municipal authority to manage public rights-of-way under section 253(c). *Id.* at 43a-52a. The district court, however, upheld the franchise fee of 5% of the gross revenues of TCG and its affiliates (including AT&T), as well as certain minimum franchise fee and in-kind requirements, as "fair and reasonable compensation" and "competitively neutral and nondiscriminatory" under section 253(c), even though Verizon was not required to pay any fees at all. *Id.* at 53a-63a.

D. Proceedings Before The Court Of Appeals

TCG appealed, and the City cross-appealed, and the FCC participated as *amicus curiae*. Before discussing the Second Circuit's decision, it is necessary to point out that petitioner misrepresents the nature of the FCC's participation. Petitioner discloses only that the FCC filed a supplemental brief in response to a request for its views by the court of appeals after argument, Pet. 11, and claims that the FCC in that brief "'respectfully refrain[ed]' from answering the Court's third post-argument question (Pet. App. at 2c) on the meaning of the terms 'competitively neutral and nondiscriminatory.'" Pet. 15-16. Petitioner makes this claim

to suggest to the Court that "the lower courts will not receive instruction in these matters from any source other than this Court." *Id.* at 15.

Petitioner's claim is false. On June 12, 2001, prior to oral argument and within the normal time required for submission of *amicus* briefs, the FCC filed on its own volition a 19-page *amicus* brief – never disclosed by Petitioner – arguing that the court of appeals "should reverse the district court's holding that the franchise fee imposed on competitive local exchange carriers and not on the incumbent is *competitively neutral and nondiscriminatory*, and should hold that this requirement is preempted under section 253 of the Communications Act." Brief of the Federal Communications Commission And The United States As *Amici Curiae* at 19, *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. filed June 12, 2001) ("Initial FCC Br.") (emphasis added). Precisely because the FCC had argued in detail why the City's requirements violated the competitive neutrality and nondiscrimination standard of section 253(c), the Second Circuit after argument (on January 29, 2002) addressed three additional sets of questions to the FCC. Two of the questions concerned agency jurisdiction, while the third dealt with the separate requirement of section 253(c) that any compensation demanded for right-of-way access be "fair and reasonable." See Pet. App. 1c-2c (seeking guidance on the meaning of this standard "wholly apart from whether the fee is 'competitively neutral and nondiscriminatory'"). Contrary to the City's representation, it is this third set of questions on the meaning of "fair and reasonable compensation" in section 253(c) – not on the competitive neutrality and nondiscrimination issues raised in this petition, which the FCC had already briefed – upon which the FCC in its supplemental brief refrained from taking a definitive position until it "completed the pending proceedings on rights-of-way management" in which that issue might be decided. Supplemental Brief of the Federal Communications Commission And The United States As

Amici Curiae at 10, *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. filed Mar. 11, 2002).

On the merits, the Second Circuit ruled in favor of TCG and invalidated all the challenged provisions of the Ordinance and the August Proposal. The Second Circuit decided *sua sponte* that it need not dismiss the case on the basis of the FCC's possible primary jurisdiction. Pet. App. 9a-12a. On the issue of whether the franchise violated section 253(a), the Second Circuit expressly adopted the FCC standard: namely, that a state or local law is unlawful if it "'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.* at 15a (quoting *California Payphone Ass'n*, 12 F.C.C.R. 14191, 14206 (¶ 31) (1997), *available at* 1997 WL 4000726). The court held that certain provisions of the franchise – such as the right of the City to reject any application based on public interest factors – amount to a right to prohibit service, even if the City could waive that right. It also held that the long delays in the franchise process prohibited TCG from providing service. *Id.*

The court of appeals then turned to whether any of the individual provisions of the Ordinance or the August Proposal were saved by section 253(c). On the franchise fee, the court of appeals declined to reach the question of whether a fee of 5% of the gross revenues of the carriers and its affiliates was "fair and reasonable compensation" for use of the right of way. Pet. App. at 16a-20a. The court instead held that the 5% fee, and the other compensation requirements, were not "competitively neutral and nondiscriminatory" because the City did not impose them on Verizon. The Second Circuit held that the competitive neutrality of fees had to be determined based on the future costs of providing services, not sunk costs incurred in the past. Verizon's provision of free existing conduit where the costs are sunk (and presumably long recovered in the rate base) did not count. It was not competitively neutral for the City to grant Verizon a

structural pricing advantage in its franchise fee requirements. The Second Circuit emphasized that section 253(c) did not require identical fees for all competitors. A city could consider costs of the providers' different uses of the rights-of-way and scale of use, and demand different kinds of compensation so long as a "rough parity between competitors" was maintained. But the City could not impose a host of compensation burdens on one competitor and none on the other. *Id.* at 20a-23a. The Second Circuit also held that all of the contested nonfee provisions of the franchise ordinance and proposal were invalid as not sufficiently related to management of the right-of-way. *Id.* at 23a-26a.

REASONS FOR DENYING THE PETITION

The City of White Plains has prohibited TCG from providing any telecommunications services in the City of White Plains and has imposed franchising requirements upon TCG that it does not apply to the incumbent monopoly provider Verizon. Those requirements include an exaction of 5% of the gross revenues of TCG and its affiliates (such as AT&T), which places TCG at a 5% pricing disadvantage in its competition with Verizon. Adopting the position urged by the FCC below as *amicus curiae*, the Second Circuit correctly held that the City's franchising requirements erected a barrier to entry preempted by section 253 of the Act. None of the grab bag of issues raised by the City is worthy of this Court's review. There are no conflicts of authority that can be resolved by review of the judgment below; this case is not the proper vehicle for decision of these issues in any event; and the City's position on the merits is flawed and foreclosed by the stipulated facts.

I. THERE IS NO CONFLICT ON THE STANDARD FOR PREEMPTION UNDER SECTION 253(a).

The City first claims that this Court should review the standard for preemption under 253(a) because the statutory

language (like many of the provisions of the 1996 Act) is ambiguous. Pet. 14-17; cf. *AT&T Corp.*, 525 U.S. at 397 ("It would be a gross understatement to say that the 1996 Act is not a model of clarity"). But there is no conflict of authority on the standard adopted by the Second Circuit, which is also the standard announced by the FCC. Pet. App. 15a. Certainly no court of appeals has adopted the extreme and unsupportable position urged by the City, namely, that section 253(a) only preempts state or local legal requirements that absolutely and unconditionally "prohibit competitors from operating in the City." Pet. 9. This Court does not grant certiorari simply because a "case offers the opportunity to analyze Section 253 and to instruct the lower courts in its proper application." *Id.* at 17. On this issue, the City presents nothing more than an insubstantial and factbound claim.

Section 253 forbids any state or local legal requirement that "*may* prohibit or have the *effect* of prohibiting *the ability* of any entity to *provide any* interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The language of "may have the effect of prohibiting" a carrier's "ability" to provide any service is not crystalline in its clarity, as many courts have remarked. See, *e.g.*, *City of Abilene, Tex.* v. *FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). But the City's reading of the statute – that only state and local laws that absolutely prohibit a carrier from entering a market – is not consistent with that text, much less compelled by it. First, the statute, by its use of the phrase "may have the effect," looks to potential effects, not just actual prohibitions. Second, section 253(a) covers the potential prohibitory effects on a carrier's "ability" to provide "any" telecommunication service. *See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."). Section 253 cannot be reasonably read to outlaw only state and local legal requirements that make it impossible for a carrier to provide a telecommunications service to *all* potential customers of that service; any

requirements that deny a carrier the ability to compete effectively in a market are preempted under section 253(a) unless preserved by section 253(b) or (c).

The FCC has accordingly interpreted section 253(a) to preempt not only outright prohibitions, but "legal barriers to entry" that "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Texas Preemption Order*, at 3470, 3480 (¶¶ 22, 41). The Second Circuit adopted the FCC's interpretation. Pet. App. 15a. To the extent section 253(a) is ambiguous (as Petitioner concedes it is), the FCC is entitled to deference in interpreting section 253(a), which it enforces pursuant to section 253(d). See 47 U.S.C. § 253(d) (granting the Commission the power to preempt state laws or legal requirements that violate section 253(a)); *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984).[2]

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[2] In a strained attempt to avoid *Chevron* deference, the City suggests that the Second Circuit did not adopt the FCC's standard. Pet. 19 n.20. That is simply false. The Second Circuit expressly quoted that standard as set forth in FCC orders, and held that "[w]e agree with these precedents." Pet. App. 15a. The Second Circuit then found that the Ordinance and the City's extensive delays in implementing that Ordinance in processing TCG's request for right-of-way access posed "obstacles ... to TCG's ability to compete in White Plains on a fair basis." *Id.* Contrary to the City's claims, the Second Circuit was applying and restating the FCC's "compete in a fair and balanced legal and regulatory environment" standard, not departing from it. Likewise wrong is the City's claim that the Second Circuit held that the FCC orders interpreting section 253(a) were "'not controlling.'" Pet. 19 n.20 (quoting Pet. App. 14a). The Second Circuit made that statement in regard to "FCC interpretations of the scope of section 253(c)," given ambiguity regarding the FCC's enforcement jurisdiction under that subsection. Pet. App. 14a. The Second Circuit never held that FCC orders interpreting section 253(a), which the FCC directly enforces, were not entitled to *Chevron* deference. Indeed, pursuant to its broad rulemaking powers under section 201(b) of the Act, the FCC is entitled to *Chevron* deference in its interpretation even

Moreover, the FCC's interpretation adopted by the Second Circuit is clearly correct and at a minimum a reasonable interpretation of the statute. The title of section 253 is entitled "Removal of barriers to entry." See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). The concept of barrier to entry is not limited to absolute prohibitions on entry, but encompasses any "factor in a market that makes the cost of doing business higher for a new entrant than it is for established firms." Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 11.6, at 305 (1985); 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 420, at 57-58 (2d ed. 2002). The legislative history likewise makes plain that section 253 "preempts almost all State and local barriers to competing with the telephone companies." S. Rep. No. 104-23, at 5, 35 (1995) (characterizing section 253(a) as "intended to remove barriers to competition"); 141 Cong. Rec. S7886, S7888-89 (daily ed. June 7, 1995) (remarks of Sen. Pressler, sponsor) (Act "[r]emoves virtually all legal barriers to competition"); *id.* S8306 (daily ed. June 14, 1995) (remarks of Sen. Gorton) (same). Indeed, this Court has interpreted section 253(a) to outlaw not only absolute prohibitions on entry, but any state or local law that "impedes the provision of 'telecommunications services.'" *Verizon*, 122 S. Ct. at 1662; *AT&T Corp.*, 525 U.S. at 371 (section 253(a) precludes states and localities from "enforc[ing] laws that impede competition"); 525 U.S. at 416 (Breyer, J., concurring in part and dissenting in part) (section 253(a) dismantles "legal barriers" that would "inhibit" entry).

Furthermore, the City's contrary position altogether disregards the Act's purpose of fostering local competition against incumbent monopolists. The City's argument is that Congress granted localities a nearly boundless authority to

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of those provisions of the Act it does not directly enforce. *AT&T Corp.*, 525 U.S. at 380, 386.

reduce a competitor's entry to a trickle so long as they do not plug the dike completely. Contrary to the City's claims (Pet. 18-20), the FCC and Second Circuit did not invoke statutory purpose to override the plain meaning of a statute. Rather, they simply recognized that a court interpreting a statute "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). The overriding purpose of the 1996 Act informed the Second Circuit's reading of section 253's broad preemption of state or local requirements that may effectively prohibit the ability of "any entity to provide any interstate or intrastate telecommunications service."

The standard adopted by the FCC and the Second Circuit is thus plainly correct, and there is no split among the circuits on this point. The City implies that the Sixth Circuit rejects this standard, but that is not true. The Sixth Circuit found no violation of section 253(a) on the evidence presented in that case, but suggested that state or local laws that help one carrier "undercut its competition" and create "a barrier to entry by newcomers" may violate section 253(a). See *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). Although the Sixth Circuit (in TCG's view) erroneously applied this standard to the facts presented in that case, it did not directly reject the legal standard adopted by the FCC and the Second Circuit, and the Sixth Circuit (like every other court) did not adopt the City's position that section 253(a) only covers absolute exclusions from the market.

This case is also not the proper vehicle to test the validity of the FCC standard. This is not a case where the legal requirements at issue simply favor one competitor over another. Here, the City in fact prohibited TCG from providing telecommunications services in White Plains. The Ordinance flatly provides that "[n]o person shall use or

occupy the streets as a telecommunications provider" without a franchise or revocable license. Pet. App. 5b. Insisting upon onerous and discriminatory terms in the August Proposal, and exercising its absolute discretion to delay and deny entry, the City blocked TCG from providing service in White Plains.

Thus, even if the FCC standard were not so indubitably correct, the City's legal requirements squarely violate the textual command of section 253(a) because by any lights they "have the effect of prohibiting" TCG from being able to provide telecommunications service in White Plains. The City implausibly asks this Court in effect to rewrite the statute to preempt only legal requirements that "have the effect of *unconditionally and absolutely* prohibiting" a carrier from providing service. Not only is the City's position inconsistent with the statute, but the FCC has also rejected the City's interpretation, holding, in an order affirmed by the Tenth Circuit, that section 253(a) forbids entry barriers regardless of whether they are "'absolute'" or "'conditional.'" *Silver Star Telephone Co.*, 13 F.C.C.R. 16356, 16360 (¶ 8) (1998), *aff'd*, 201 F.3d 1264, 1268 (10th Cir. 2000); see Pet. App. 15a (noting Second Circuit's agreement with the Tenth Circuit).

The City points again to the Sixth Circuit's holding in *Dearborn* that a conditional prohibition on the provision of service without a franchise is not, without more, a violation of section 253(a). Although the Sixth Circuit was wrong on that point, see, *e.g.*, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 628-29 (1974) (laws requiring governmental approval prior to entry are classic "regulatory barriers to entry"); 2A Areeda, *supra*, ¶ 421h, its rule is not implicated on these facts. The Second Circuit relied not simply on the prohibitory clause of the Ordinance, but on the broad and unlawful discretion the Ordinance otherwise grants city officials, the demands reflected in the City's August Proposal, and the City's "extensive delays" in processing TCG's request for right-of-way access. Pet. App. 15a. The City asks this Court to revisit the facts of this case and find no delays,

Pet. 18-19, but there is no reason this Court would wish to undertake such a factbound inquiry that has no importance outside this case.

In short, the City's first issue is factbound, is clearly wrong on the merits, presents no conflict in the circuits, and is thus not remotely worthy of review.

II. THERE IS NO CONFLICT ON WHETHER THE PROHIBITORY EFFECT OF THE ORDINANCE AS A WHOLE MAY BE CONSIDERED.

The City also challenges the Second Circuit's conclusion that it should consider the effect of the Ordinance as a whole in determining whether it creates a barrier to entry subject to preemption under section 253(a). Pet. App. 15a-16a. There are manifold reasons for the Court to deny certiorari on this issue as well.

First, the City alleges no conflict of authority on this point.

Second, the Second Circuit found that the City had waived any objection to this approach because "the district court applied this methodology and neither party objected." Pet. App. 16a. The City counters that there was a single sentence in its opening brief on appeal – and that is all it was – that declares that *certain* of the *nonfee* provisions at issue "'do not even arguably prevent from TCG from offering service under Section 253(a).'" Pet. 22 n.22. That argument is unresponsive to the issue of waiver before the *district court*, and indeed effectively concedes waiver. Moreover, waiver aside, there is no reason this Court should reach out to review an issue that was not fully briefed to the court of appeals.

Third, as noted above, the Second Circuit did not rely solely on the terms of the Ordinance in finding a violation of section 253(a); it also relied on the terms of the August Proposal and on the City's extensive delays under the auspices of the Ordinance in acting upon TCG's request for

access. Pet. App. 15a. Thus, resolution of the issue presented would not exonerate the City.

Fourth, the City's position is meritless. As the Second Circuit points out, "applying § 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions." Pet. App. 16a. Congress was concerned about the practical effect of state and municipal regulation on the competitive provision of telecommunications service, and nothing in the text or policy of the Act suggests that Congress excluded from preemption state and local regulations that as a whole defeat competition. This issue is neither suitable for, nor worthy of, review.[3]

III. NO CONFLICT ON THE COMPETITIVE NEUTRALITY STANDARD IS PRESENTED BY THE JUDGMENT BELOW.

The City next claims that the Second Circuit interpreted the competitive neutrality standard of section 253(c) to require "the City to [c]harge the [s]ame [f]ranchise [f]ees" to new entrants and incumbents, and that this case presents an opportunity to resolve a conflict between the Second and Sixth Circuits. Pet. 23. Neither claim is true.

The City here sought to charge a franchise fee of 5% of the gross revenues of TCG and its affiliates (including AT&T, a

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[3] The City argues that the Second Circuit's ruling on this point overrides the statutory phrase in section 253(c) that "[n]othing shall affect" municipal power to manage rights of way, 47 U.S.C. § 253(c). Pet. 24. That argument is wrong. The Second Circuit specifically held that even after the ordinance as a whole is analyzed under section 253(a), it would analyze whether individual provisions are saved by section 253(c) so as to avoid "improper infringement of the City's legitimate interests in regulating the uses of the public rights-of-way." Pet. App. 15a-16a. "Nothing" in the Second Circuit's application of section 253 does "affect" legitimate municipal authority under section 253(c).

long-distance carrier), as well as demanding certain minimum fees and in-kind compensation. Pet. App. 2d-4d. The City did not impose fees of any kind (or, indeed any franchising requirements) on Verizon. Instead, the City continued to have the use of space in Verizon conduit that had long ago been built and provided.

The Second Circuit had no trouble finding the City had failed to prove that its imposition of fees of this kind on a new entrant but not on the incumbent with which it competes was not "competitively neutral." Citing this Court's decision in *Verizon*, 122 S. Ct. at 1653-54, the Second Circuit recognized that only forward-looking costs, and not sunk costs, have economic relevance. Pet. 20a.[4] Verizon's expenditures to build the conduit years ago were sunk costs, and in any event Verizon was compensated for those expenditures over the years by its monopoly status and by the inclusion of those costs in its regulated rate base. *Id.*; Initial FCC Br. 16 (noting that presumably the historical costs of the conduit were included in the rate base and thus already reimbursed by ratepayers in traditional cost-of-service ratemaking). Moreover, because the franchise fee required TCG to turn over 5% of every dollar the company or its affiliates earned, it placed TCG at a structural pricing disadvantage in head-to-head competition with Verizon. The court rightly concluded that "Verizon will have the advantage of choosing to either

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[4] The term "forward-looking costs" refers to costs incurred on a going forward basis as output changes; thus, if a carrier subject to a 5% franchise fee produces services that it sells for $100, the $5 it pays to the municipality is a forward-looking cost because it is incurred with the provision of services. Verizon's past expenditure to build conduit is a sunk cost because it does not change with output. Because it is sunk, it is not economically relevant and Verizon does not take such cost into account in generating or pricing its telecommunications services. *See generally Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 11 F.C.C.R. 15499, 15844-45 (¶ 675) (1996); *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1116-17 (7th Cir. 1983).

undercut TCG's prices or to improve its profit margin relative to TCG's profit margin," and that such skewed competition contravenes the Act. Pet. App. 21a. Indeed, this is the very result and analysis that the FCC urged in its *amicus* brief in this case and has adopted in its orders interpreting the Act's "competitive neutrality" requirements.[5]

The City makes a series of unsound arguments suggesting that the Second Circuit misinterpreted section 253(c). First, the City incorrectly argues that the Second Circuit effectively resurrected the "parity" provision of section 243 of H.R. 1555, which required that no different fees could be imposed on incumbent and nonincumbent carriers, and which was superseded by the current section 253. Pet. 25-27. But the Second Circuit made clear that "[t]he statute does not require precise parity of treatment," and that the City could impose different fees on different providers by taking into account "different uses of the rights-of-way," "[t]he scale of the use of rights-of-way," and the "costs incurred" by the municipality. Pet. App. 22a-23a.

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[5] The FCC noted that the imposition of incremental costs in the amount of 5% of gross revenues on TCG but not Verizon "inevitably puts TCG at a pricing disadvantage in relation to Verizon," and is not competitively neutral because it would "'give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber.'" Initial FCC Br. 16 (quoting *Telephone Number Portability*, 13 F.C.C.R. 11701, 11731-32 (¶ 53) (1998)). *See also, e.g., Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 8888 (¶ 200) (1997) (costs of universal service must be borne equitably by all competitors); *Numbering Res. Optimization*, 15 F.C.C.R. 7574, 7596-98 (¶¶ 47-51) (2000). The City's claim that the FCC has no authority to interpret section 253(c) is meritless. *See supra* n.2. In any event, the term "competitively neutral" presumptively has the same meaning whenever it is used in the Act, *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986), and most assuredly does not have a different meaning in subsections 253(b) and (c). Even the City does not dispute that the FCC has the authority to interpret and enforce section 253(b), *see* 47 U.S.C. § 253(d), and thus the Commission's interpretation of "competitively neutral" must be given deference.

Second, contrary to the City's claim, the Second Circuit did not err in failing to remand the case for a determination of the value of the use of Verizon's existing conduit. As an initial matter, the value of the conduit is irrelevant; any fee structure that imposes forward-looking costs on the new entrant but not on the incumbent is by definition not competitively neutral. Pet. App. 22a-23a. Furthermore, it was the City's burden to prove the competitive neutrality of its fees under section 253(c) once TCG proved a violation of section 253(a), *New Jersey Payphone Ass'n* v. *Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *Texas Preemption Order* at 3463 (¶ 4); Pet. App. 40a n.5, and the City failed to adduce that proof.

Third, the Second Circuit did not err in failing to consider the alleged "regulatory compact" by which, according to the City, it granted Verizon access to its streets in return for a guarantee of universal service to its residents. Pet. 24-25. Not only does the record refute this claim of a regulatory compact, see *supra* at 8-9, but universal service can form no part of the analysis. As the FCC informed the court, universal service is an obligation imposed by (and funded under) state and federal law, not municipal agreements; thus, the Act exempts competitively neutral efforts of states (not municipalities) to preserve and advance universal service in section 253(b). Initial FCC Br. 17-18. Finally, municipal requirements to advance universal service would thwart the new universal service mechanisms that the FCC and the States are developing under the auspices of section 254 of the Act, which requires "specific and predictable mechanisms" for promoting universal service funded by "equitable and nondiscriminatory" contributions by all carriers, 47 U.S.C. § 254. Initial FCC Br. 18-19.

Not only is the City's attack on the ruling below meritless, but this case does not present any conflict between the judgments of the Second and Sixth Circuits, as the City claims. It is true that the Second Circuit opined that the Sixth

Circuit's decision in "*TCG Detroit* was wrongly decided." Pet. App. 21a. *TCG Detroit* held that, where a municipality attempts to impose gross revenues fees on the incumbent but a court holds that the municipality is barred from doing so by state law, the imposition of such fees on a new entrant does not violate the competitive neutrality requirement of section 253(c). 206 F.3d at 624-25. The Second Circuit correctly concluded that this is wrong, for "§ 253 does not limit municipalities to charging fees that are 'competitively neutral' to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality's intent." Pet. App. 21a. The bar on discrimination is absolute.

But while the Second Circuit rejected the Sixth Circuit's construction of § 253, the Second Circuit noted that the facts presented in the two cases are not "precisely analogous," Pet. App. 21a, and thus there is no conflict between the *judgments* of the two circuits. The Sixth Circuit's decision in *TCG Dearborn* rested on its separate holding that a gross revenue assessment on the incumbent was barred by state law, and there is no indication that the Sixth Circuit would have reached a different result than did the Second Circuit in a case, as here, where such circumstances are not present. Similarly, affirmance of the Second Circuit's judgment would not resolve the conflict over whether gross revenues fees imposed only on the new entrant are competitively neutral when state law has been held to bar the city's attempted imposition of such fees on the incumbent. Review of the Second Circuit's invalidation of the patently discriminatory franchise fee in this case is wholly unwarranted.

IV. THE ISSUES REGARDING NONFEE PROVISIONS ARE NOT WORTHY OF REVIEW.

Finally, the City claims that the Second Circuit erred in invalidating two nonfee provisions: (1) a provision permitting City officials to approve or deny access to public rights-of-way on any basis they deem to be in "the public interest," and

(2) provisions giving the City the right to approve any transfer not only of the franchise but of the corporate control of TCG! See Pet. 27-31; Pet. App. 9b, 12b, 9d-12d. Once again, neither issue is remotely worthy of review for a host of reasons.

First, the City alleges no split of authority on these issues.

Second, the flaws in these provisions are tied to the specific provisions of this Ordinance and the August Proposal.

Third, even if the City were correct that the provisions were not inherently offensive, the City still would have violated the competitive neutrality requirement of section 253(c) because it did not impose them on Verizon. See Pet. App. 20a.

Fourth, the City's claims of error are farfetched. On the public interest standard, the Second Circuit did not apply "strict scrutiny," announce a general rule that the public interest standard is void for vagueness, or entertain facial due process challenges in contravention of *United States* v. *Salerno*, 481 U.S. 739 (1987), as the City imaginatively argues. Pet. 27-29. The Second Circuit simply applied section 253(c) according to its terms, and held that the City could only regulate access to public rights-of-way "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis," 47 U.S.C. § 253(c). As the district court noted, other courts have likewise found such broad grants of discretion to exceed the bounds of section 253(c). Pet. App. 48a (citing cases). Federal law does not permit the City to deny or condition the access of telecommunications providers to public rights-of-way for any reason they deem to promote the public interest.

Similarly, the City's argument regarding the franchise and corporate control transfer provisions can be quickly dismissed. As an initial matter, the claims that this ruling endangers republican government under the Guaranty Claims,

commandeers local governments in violation of the Commerce Clause, and destroys the City's right to exclude others from public property in violation of the Fifth Amendment (Pet. 30-31) were never raised and thus never addressed below. That is evidenced by the City's filing in this Court for the first time a notice that the constitutionality of state and federal law would be drawn into question. In any case, the claims are meritless. The Second Circuit ruling does not deny cities the power to impose a franchise transfer restriction so long as, in line with section 253(c)'s command, it is "reasonably related to regulating the use of the rights-of-way" and is "applied neutrally to all franchises." Pet. 26a. Like the Ninth Circuit, *City of Auburn*, 260 F.3d at 1178, the Second Circuit simply struck down a transfer provision "of sweeping breadth" that arrogated to the municipalities the power to deny franchise transfers and corporate control transactions for any reason they please. Pet. 26a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS, NEW YORK,
Petitioner,

v.

TCG, NEW YORK, INC.; TC SYSTEMS, INC.; AND TELEPORT COMMUNICATIONS dba TCNY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER THE CITY OF WHITE PLAINS, NEW YORK

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Brief of Amici Curiae the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the International Municipal Lawyers Association in Support of the Petitioner the City of White Plains, New York

The amici curiae, the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the International Municipal Lawyers Association file this Brief in Support of Petitioner, the City of White Plains, New York, and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The amici consist of organizations representing local government officials throughout the United States. The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3066 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interest of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the Untied States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The amici's interest in this case arises because the decision below significantly erodes local government's traditional police power to regulate the use of public rights of way and to require compensation for that use. Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.), to promote competition in the delivery of telecommunications services. Since its enactment, the number of entities seeking to disrupt public rights of way to install telecommunications facilities has risen dramatically. The construction and maintenance of telecommunications facilities create significant stresses on local government infrastructure and budgets. To minimize the negative effects of these disruptions, local governments have sought to regulate and coordinate the use of public rights of way for telecommunications purposes, while still allowing for competition between the various telecommunications providers. The Second Circuit's decision in this case frustrates the ability of local governments to achieve this end in that circuit and on a national level. Therefore, the amici respectfully urge this Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Second Circuit, by misinterpreting the § 253 of the Telecommunications Act of 1996, improperly preempted portions of the City of White Plains telecommunications ordinance and franchise agreement. The court's various misinterpretations are in conflict with other circuit courts of appeals decisions, in conflict with at least one relevant state court decision, and in conflict with this Court's precedent.

Additionally, courts outside the Second Circuit, at both the state and federal trial and appellate levels, are now relying on the reasoning of the Second Circuit in preempting local government ordinances managing public rights of way. Because of the important nature of this case, the need for Supreme Court guidance on this question of federal law, the conflict between relevant court decisions, and the departure from Supreme Court precedent, amici urge this Court to grant the petition for certiorari.

ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI

The amici file this brief in support of the City of White Plains, New York's (the "City") petition for certiorari. The correct interpretation of § 253 of Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 253 (the "Act") is of vital importance to local governments throughout the United States. The Act affects virtually every community in the Nation. The Second Circuit's interpretation of the Act significantly erodes local government's traditional police power to regulate the use of public rights of way and to require compensation for that use. Further, in these times of fiscal uncertainty, when local government budgets are stretched to cover an ever growing list of social needs, local governments must be able to exercise discretion to determine the best use of their public rights of way, thereby determining the best use of their scarce financial resources.

The amici submit the Second Circuit decided an important question of federal law that has not been, but should be, settled by this Court. The amici further submit the Second Circuit's decision is in conflict with the decisions of

other United States courts of appeals on the same question of federal law, and is in conflict with the decisions of state courts. These factors make this case one of exceptional importance and appropriate for review by this Court.

I. INTERPRETATION OF THE PHRASE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" REQUIRES THIS COURT'S GUIDANCE

The Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Telecommunications Act of 1996, 47 U.S.C. § 253 (a). The clear language of this section provides for the preemption of only those local government regulations which **prohibit or have the effect of prohibiting** the ability of any entity to provide interstate or intrastate telecommunications service.

The meaning of the phrase "prohibits or have the effect of prohibiting" causes confusion in the courts. In fact, all of § 253 causes confusion in the courts. "This much is clear: Section 253 . . . has created a fair amount of confusion." *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002). *See also, BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1186 (11th Cir. 2001) ("As has been observed by other federal courts, the language and structure of § 253 raises two difficult questions of statutory interpretation: (1) what is the preemptive scope of § 253; and (2) who may seek enforcement of the provisions of § 253?")

As a result of this confusion, the courts, including the Second Circuit, have wandered far afield in deciding whether local government regulations prohibit or have the effect of prohibiting the provision of services. Several courts of appeals have concluded that § 253 (c) **broadly preempts** local government regulation. "The preemption is virtually absolute and its purpose is clear - - certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena." *City of Auburn v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002). Similarly, the Second Circuit, reviewing the challenged, non-fee related provisions of the City's ordinance, stated those provisions were "*relevant only for regulating telecommunications, which § 253 does not permit . . . .*" Pet. App. at 24a. (Emphasis added).

That the Act broadly preempts local government regulation is erroneous, and unfortunately, provides the basis for finding that local ordinances - in this case, the City of White Plains' ordinance - violate the Act.

Due to the misinterpretation of the preemptive scope of the Act, the Second Circuit and other courts fail to give the plain language of the statute its obvious meaning. As a result, the courts fail to apply the Act correctly to the facts of the cases before them. Because the courts interpret the Act as broadly preventing local governments from regulating telecommunications companies, the courts conclude, without more, that an incredible variety of regulations have a "prohibitory" effect on telecommunications providers.

One aspect of this broad preemptive interpretation is that the courts use § 253 (c) to determine whether a particular regulation prohibits the provision of telecommunications services. Section 253 (c) provides in part that "[n]othing in [Section 253] affects the authority of a State or local government to manage the public rights of way . . . ." Several courts have concluded that if a regulation does not regulate the rights of way, it must be a prohibition on the provision of service. *See, eg.*, *City of Auburn*, 260 F.3d at 1177. The Second Circuit concluding that the challenged provisions were not saved by § 253 (c), stated that "[t]he disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 does not permit White Plains to do. . . ." Pet. App. at 24a.

This analysis is in error on two counts. First, if a regulation is not related to the management of the rights of way, it is not per se a prohibition under § 253 (a). Whether a regulation is "saved" under § 253 (c) is a completely separate determination from whether it affects a prohibition under § 253 (a). The subsections are related only to the extent that any regulation which prohibits the provision of services is saved if it manages the right of way. This precept, however, cannot be flipped on its head as the Second Circuit and other courts of appeal have done. The plain text of the statute does not support a finding that any regulation that is not related to management of the rights of way must be a prohibition.

This mistaken linking of § 253 (a) and § 253 (c) highlights a second error engaged in by the Second Circuit and other courts of appeals: Whether a regulation prohibits or has the effect of prohibiting competition must be established by **evidence.** "In the case of a dispute over a local regulation . . ., once the party seeking preemption **sustains its burden**

of showing that a local municipality has violated Section 253 (a) by formally or effectively prohibiting entry into the . . . market, the burden of proving the regulation falls within the safe harbor in Section 253 (c) falls on the defendant municipality." *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002). (Emphasis added).

The Third's Circuit's analysis is correct - telecommunications companies must provide evidence and sustain their burden of proving that a prohibition has occurred. The Second Circuit, however, has skipped this step by misreading the clear language of the Act, and thereby furthered confusion as to the proper method of analyzing challenges to local government ordinances under the Act.

The Second Circuit requested interpretive assistance from the Federal Communications Commission ("FCC") and received qualified responses to these questions. Nonetheless, the court cited the FCC's decision in *Cal. Payphone Ass'n*, 12 F.C.C.R. 14191 (1997), which noted that an ordinance has the effect of prohibiting the provision of services when it "materially inhibits or limits" the ability of a telecommunications services provider to compete in a fair and balanced environment. Pet. App. at 15a. In spite of this, the Second Circuit made no findings regarding an inhibitory or limiting effect by the City's ordinance.

Reviewing various challenges to the City's ordinance, the court concluded that individual non-prohibitory code sections could, working together, have the effect of prohibiting telecommunications companies from providing services. "[T]o apply § 253 (a) to individual provisions without considering the Ordinance as a whole would neglect

the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions." Pet. App. at 16a. Simply reciting that a regulation affects a prohibition or materially inhibits competition, does not make it so.

Even if one assumes the validity of viewing individually non-objectionable provisions in conjunction with each other, the "whole" still does not prohibit or have the effect of prohibiting the provision of services. Unfortunately, as noted above, the Second Circuit merely observed that the provisions were "relevant only for regulating telecommunications, which § 253 does not permit White Plains to do . . . ." Pet. App. at 21a. The court failed to provide a detailed analysis of the actual prohibitory effect.

A complete review of these code sections, however, would indicate that many of them are simply reporting requirements, and encompass things that a telecommunications provider either has or should have reached a decision regarding before determining whether to proceed with entering into a particular market. Unfortunately, the Second Circuit dispensed with analyzing how the provisions affect a prohibition, skipping straight to whether the provisions were saved under § 253 (c). Conclusory statements should hardly suffice to sustain preemption of the City's ordinance. See, *New Jersey Payphone Association,* 299 F.3d at 240 (3d Cir. 2002).

The Second Circuit's conclusion regarding the permissible field of local government regulation conflicts with the Eleventh Circuit. "[I]f we read [253] (b) and (c) as delineating the absolute boundaries of state and local regulatory authority in the field of telecommunications, the

limitation set for in subsection (a) would be superfluous." *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001). The Second Circuit's holding that § 253 does not allow local governments to regulate telecommunications, except to the extent that such regulations relate to the rights of way, furthers a circuit split on this important issue.

In addition, the decisions holding that local governments may do no more than manage the rights of way conflict with at least one decision issued by a state court on the same question of law. "[The telecommunications providers'] argument presumes that the only legitimate regulatory domain of local governments is the control of rights-of-way, a presumption that cannot be squared with the language of the statute. . . ." *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002)(Table).[2]

Further, "[p]rinciples of federalism and home rule also counsel against using the authority of the federal courts to micromanage the operations of a local government by issuing broad, conclusory opinions about the effect of local

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[2]Amici acknowledge that this Court requires a decision be rendered by the highest state court in which a decision could be had. The intermediate appellate court in *AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1048 (Or. App. 2001), *cert. denied*, 52 P.3d 1056 (Or. 2002)(Table), is the highest state court in which a decision could be had as the Oregon Supreme Court declined to exercise its jurisdiction in the case. *Sullivan v. Texas*, 207 U.S. 416 (1908). See, generally, ROBERT L. STERN, EUGENE GRESSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE, 141-143 (6th ed., BNA Books 1986).

regulations without carefully examining the proffered reasons for the local government's actions or affording deference to the expertise of local officials in managing their own [rights of way]." *Qwest Corporation v. City of Santa Fe, New Mexico*, 224 F. Supp. 2d 1305 (D. N.M. 2002), *appeal docketed*, No. 0202258 (Sept. 27, 2002), citing *Printz v. United States*, 521 U.S. 898, 928 (1997).

Because the Second Circuit and other federal courts of appeals are misinterpreting the extent of the preemption provided in § 253 (a) and misinterpreting that section's relationship with § 253 (c), and because the decisions of the federal courts of appeal conflict with each other and at least one relevant state court decision, this Court is respectfully requested to grant the City's petition for certiorari to provide guidance as to the appropriate construction of "prohibit or have the effect of prohibiting."

II. THE SECOND CIRCUIT AND OTHER LOWER COURTS IMPROPERLY RESTRICT THE PHRASE "MANAGE THE PUBLIC RIGHTS-OF-WAY"

Just as the courts misinterpret the proper application of the phrase "prohibit or have the effect of prohibiting," the courts also misinterpret what it means to "manage the public rights-of-way." The courts have unnecessarily limited the meaning of the word "manage," concluding that only regulations which relate to compensation, timing, and the manner of the excavation and repair of rights of way are appropriate. *City of Auburn*, 260 F.3d at 1177 (managing the rights of way means control over the right of way itself, not control over the companies with facilities in the right of way).

Several courts have looked to the FCC's interpretation of § 253 (c) and that Section's legislative history to support their interpretation. Specifically, the courts conclude that these "types of activities" fall within the management sphere: coordination of construction schedules, timing and location of excavations, enforcement of building and zoning codes, and similar requirements. *City of Auburn*, 260 F.3d at 1177, citing *In re TCI Cablevison of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1997), and Senator Dianne Feinstein's comments during the floor debate of 253 (c), 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein). However, these items are only examples of the types of things that are permissible, and should not be considered an exhaustive list.

Had Congress intended this list to be exhaustive, Congress could have explicitly limited local government authority to these types of activities. Congress did not do this, but chose instead to use the phrase "manage" the rights of way. According to Webster's Seventh New Collegiate Dictionary, the definitions of the word "manage" include:

> 1. Handle, Control
> 2. to make or keep submissive
>
> ****
>
> 1a. To direct or carry on business or affairs

Webster's Seventh New Collegiate Dictionary 513 (1969). Congress was surely aware of the meaning of the word "manage" when it drafted the Act. In general, it is "presumed that 'the ordinary meaning of [a statute's] language accurately expresses the legislative purpose.'" *Missouri Municipal League v. Federal Communications Commission*, 299 F.2d

949 (8th Cir. 2002), *quoting Morales v. Trans World Airlines, Inc.*, 502 U.S. 374 (1992).

Further, it is simply incorrect to conclude that information relating to the financial and technical capabilities of a telecommunications company, its plans for the provision of service in a jurisdiction, and similar disclosure requirements are unrelated to the management of the rights of way. Each of these factors is intimately related to the management of the rights of way because it is only through an evaluation of these factors that a local government can reach a conclusion as to whether a particular provider is an appropriate candidate for the use of the rights of way. If a telecommunications provider is not financially or technically capable and a local government grants the company authority to proceed regardless of this incapability, the local government must later expend valuable resources to rectify the situation. Congress surely did not intend to place local governments in such a precarious position. The fallacy of such a conclusion can be seen by the spate of financial disasters which are plaguing telecommunications providers and causing many local governments to scramble to alleviate problems associated with these corporate implosions.

The Second Circuit did not define what it considered appropriate management, but presumably relied on the same logic as other courts of appeals when it held that none of the challenged ordinance provisions qualified as management. Pet. App. at 24a. The court failed to provide reasons why the challenged sections were not related to the management of the rights of way, concluding that the provisions were "relevant only for regulating telecommunications, which § 253 does not permit . . . ." Pet. App. at 24a.

This conclusion fails to appropriately take into account the plain meaning of the statute. The more appropriate finding is that "[t]he intent of section 253 (c) was to leave undisturbed the traditional local authority to 'manage the public rights-of-way." *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (2001), *appeal dismissed*, (11 th Cir. Aug. 30, 2001) (No. 01-13218). Because the Second Circuit's decision advances an incorrect interpretation of the phrase "manage the public rights-of-way," this Court is respectfully requested to accept this case and provide guidance as to the appropriate application of the phrase.

III. INVALIDATION OF THE PUBLIC INTEREST STANDARD CONFLICTS WITH THIS COURT'S PRECEDENT

The Second Circuit also improperly determined that the Act prohibits the City from exercising discretion in reviewing franchise applications. The court relied upon *City of Auburn* for the principles that actions taken for the "public interest" by local government legislative bodies provide legislators with discretion and that the Act prohibits the exercise of discretion. Pet. App. at 24a.

As the Petitioner points out, this Court has approved the "public interest" standard and the Second Circuit's finding in this regard is contrary to this Court's precedent. Pet. at 28. Reviewing actions of the FCC under the Communications Act of 1934, 47 U.S.C § 151, *et seq*., (1934), in *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), this Court noted that the "public interest" standard

must be evaluated in the context of the purpose of that act.[3] Citing to several of its earlier decisions, this Court approved of the "public interest" standard. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), *see also Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24 (1932). Speaking specifically of radio transmissions, the Court stated that the public interest standard should be viewed in terms of the "scope, character, and quality of services." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943), citing *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

Just as the public interest standard was acceptable in *National Broadcasting*, so too, is it acceptable in local regulations governing telecommunications services, specifically, regulations governing the granting of franchises for use of the public rights of way. Just as the FCC was charged with ensuring the best possible service for the public in terms of radio services, so, too, are local governments obligated to ensure the best possible use of their rights of way. As such, the Second Circuit's decision regarding the vagueness of the public interest standard is in direct conflict with this Court's precedent. Therefore, it is respectfully requested that this Court grant certiorari to reiterate the validity of the public interest standard.

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[3]The Communications Act of 1934 provided in relevant part that the Federal Communications Commission should from time to time, as public convenience, interest or necessity required, make rules and regulations and prescribe restrictions and conditions as necessary. See, § 301, generally.

CONCLUSION

For the foregoing reasons, amici join the City of White Plains in its request that the Court grant the petition for certiorari in the above referenced case.

Respectfully submitted,

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No. 02-1062

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IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS d/b/a TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 02-1062

IN THE
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CITY OF WHITE PLAINS,

Petitioners,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., AND TELEPORT COMMUNICATIONS d/b/a TCNY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

INTEREST OF THE AMICUS CURIAE

The City has a significant interest in having this Court grant the petition. The City's Charter, as constituted since 1898, requires that any private entity that seeks to occupy streets owned by the City for the provision of services such as telecommunications must receive a

"franchise" -- a type of lease -- from the City, and must pay adequate compensation to the City for its occupancy of such streets (New York City Charter § 365). In its fiscal year 2002, New York City received approximately $25 million from companies comparable to respondent complying with the franchise compensation requirement of the City Charter. Since 1990, the City has granted franchises, consistent with the City Charter, to twenty different companies to provide services similar to those offered by respondents, which franchises include many terms, such as compensation terms, similar to those at issue in the case at bar. However, because the incumbent local exchange company in the City, Verizon Communications, Inc. ("Verizon"), claims rights to occupy the City's streets that predate 1898, when the City Charter's adequate compensation requirement became effective, the Second Circuit's decision threatens the City's ability to enforce the adequate compensation provision of the City Charter with respect to future franchise applicants comparable to respondents. In addition, the City's form of franchise contract includes a number of provisions intended to protect the interests of the City's citizens that, pursuant to the Second Circuit's decision, the City may be preempted from including in future franchise agreements covering services comparable to those sought to be offered by respondent TCG New York, Inc. ("TCG").

SUMMARY OF THE ARGUMENT

The petition should be granted for four reasons:

First, the issues raised in this case are of great significance. For municipalities around the country, who paid for and own thousands of miles of streets and other similar property, worth billions of dollars, the ownership and control of such property are brought into serious

question by the Second Circuit's decision; additionally, the split in the circuits on the issues raised in this case is causing uncertainty and confusion in the implementation of the 1996 Telecommunications Act (codified at 47 U.S.C. §§ 151 et seq.).

Second, the Second Circuit's decision splits fundamentally from the Eleventh Circuit's common sense, plain meaning understanding of 47 U.S.C. § 253(a) (hereinafter, "§ 253(a)") in the BellSouth case cited below (at page 8), and infringes on local government authority over local streets to an extent far beyond what Congress provided. By assuming that any *condition* that a local government places on the use of its streets is automatically and by its nature a *prohibition* on the provision of telecommunications services, no matter how amenable to compliance such a condition may be in practice, the Second Circuit's decision destroys the careful balance established by Congress between the property rights and authority of local communities on the one hand and the interests of telecommunications providers on the other. Indeed, the Second Circuit's conflation of conditions with prohibitions renders nonsensical the structure of § 253(a).

Third, the Second Circuit's decision splits fundamentally from the Sixth Circuit's common sense, plain meaning understanding of 47 U.S.C. § 253(c) (hereinafter, "§ 253(c)") in the TCG Detroit case cited below (at pages 8-9) in a manner that may in effect replace the provision that Congress adopted with a court-created provision comparable to one that Congress definitively rejected.

Fourth, the Second Circuit decision facially invalidates certain pieces of local legislative and regulatory language that are fully capable of being applied or enforced

in a manner wholly consistent with even the Second Circuit's own (excessively narrow) view of local authority. Thus, the Second Circuit decision runs afoul of long-standing judicial principles regarding facial invalidation of legislative and regulatory language.

In short, the Second Circuit's inconsistency with the Eleventh and Sixth Circuits, and with settled principles of separation of powers, could cost local communities and their taxpayers millions of dollars and damage the ability of local entities to manage and control the property they purchased, own and operate. Unless this Court grants the petition for a writ of certiorari in this case, the split in the circuits regarding the application of 47 U.S.C. § 253 will result in ongoing confusion as to the appropriate balance in the relationship between local government authority over its own property and the rights of telecommunications service providers.

ARGUMENT

I. THE ISSUES RAISED ARE OF GREAT SIGNIFICANCE.

In its fiscal year 2002, the City of New York collected over $25 million in rent from telecommunications providers whose facilities are installed in property owned by the City. Thousands of other municipalities across the country similarly collect and rely on rentals generated from the occupancy by telecommunications providers of property purchased and maintained by municipalities with taxpayer funds. An inability to collect such rents will negatively affect local taxpayers and citizens, either by necessitating tax increases or requiring reductions in local services. The Second Circuit's decision in this case calls into question municipal authority to collect reasonable rent for the use of municipally purchased and owned property, and to manage such property in the public interest.

In addition, the confusion that the Second Circuit's decision is causing, inconsistent as it is with decisions of the Sixth and Eleventh Circuits, threatens to interfere with the growth and health of the telecommunications services marketplace. Since the Second Circuit's decision was issued, the City has received numerous calls and letters from telecommunications providers uncertain about how to proceed with respect to use of municipally owned property. In light of conflicting court of appeals decisions and inconsistencies between the language of the applicable statutory provisions and the implications of the Second Circuit decision, such uncertainty is inevitable until this Court acts definitively. Unless and until this Court resolves the split in the circuits regarding their differing interpretations of 47 U.S.C. § 253, neither municipalities

nor telecommunications service providers will be able to proceed with certainty in making investments and reaching agreements that will enable the expansion and growth of the telecommunications market in a manner consistent with the property rights and interests of local governments representing local taxpayers and citizens.

II. THE DECISION BELOW SPLITS RADICALLY FROM THE PLAIN MEANING UNDERSTANDING OF §253(a) RECOGNIZED BY THE ELEVENTH CIRCUIT, AND RUNS AFOUL OF THE CLEAR LANGUAGE OF §253(a).

§ 253(a) provides as follows:

> In general - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

In the case below, the City of White Plains ("White Plains") was never shown to have "prohibited" or "effectively prohibited" TCG from providing any telecommunications service. White Plains did require that if TCG were to install facilities in street property owned by White Plains, TCG would be required to meet certain conditions (including the payment of rent) comparable to those any landowner might require of an entity seeking, as was TCG, to become a tenant on the landowner's property. See St. Louis v. Western Union Telegraph Co. 148 U.S. 92 (1893), petition for rehearing denied 149 U.S. 465 (1893). There was no showing below that TCG would be unable to

meet these conditions or that it could not viably provide service while meeting these conditions. Indeed, the only relevant fact adduced below relevant to TCG's ability to meet the proposed conditions was that other companies similarly situated to TCG had agreed to such conditions and have provided service in accordance with such conditions. That other telecommunications companies had agreed to meet such conditions, and have provided service pursuant to such conditions, seems to suggest that TCG could do the same, or at least that TCG should have the burden of proof of showing why it, unlike others, would be unable to provide service while meeting the conditions for tenancy proposed by White Plains. Yet without any such showing, the Second Circuit determined, as a matter of law, that the conditions of tenancy proposed by White Plains represented a "prohibition" or "effective prohibition" on TCG's provision of service and therefore a violation of § 253(a).

While the Second Circuit's discussion of this issue is extremely cursory, it appears that the court assumed that the mere existence of conditions to a tenancy, no matter how easily met, are tantamount to a "prohibition" and thus a violation of § 253(a). But to view any *condition* that a local government places on the use of its property as being equal, as a matter of law, to a *prohibition* on the provision of telecommunications service makes nonsensical the structure of § 253. If any *condition* (such as, for example, a rent payment requirement) is automatically and necessarily a *prohibition*, then why did Congress provide in § 253(a) that local governments may not "prohibit *or have the effective of prohibiting*" provision of telecommunications service? If Congress meant for every condition to automatically constitute a prohibition, then there would be no need for a separate ban on "effective" prohibition; that is, the reference to effective prohibition would constitute

meaningless surplusage. Furthermore, if Congress had meant to say in § 253(a) that local governments may not place any conditions or requirements on the use of local rights of way for telecommunications purposes, it could have done so straightforwardly, as it did elsewhere in Title 47, for example in 47 U.S.C. § 544(a) ("Any franchising authority may not regulate the services, facilities and equipment provided by a cable operator except to the extent consistent with this title."). But Congress chose not to limit local government conditions or requirements in § 253(a), unless such conditions or requirements become so onerous and difficult to meet as to "effectively" prevent the provision of service.

There was no showing of such onerousness in the case below. All we know about TCG with respect to the conditions of tenancy required by White Plains is that TCG *preferred* not to meet such conditions, and therefore it *refused* to meet such conditions -- no showing was made that TCG was unable to meet such conditions or that such conditions were so onerous that TCG would have been effectively prevented from providing service. The Second Circuit should have remanded this case to the District Court for a factual determination as to whether the conditions that White Plains sought to require from TCG as the terms of TCG's tenancy on White Plains property were so onerous or difficult to meet as to rise to the level of an effective prohibition on TCG's ability to provide service. Only such a factual determination can determine whether White Plains violated § 253(a). When presented with the same kind of issue, the Eleventh Circuit issued just such a remand. See BellSouth Telecommunications, Inc. v. Town of Palm Beach 252 F.3d 1169 (11th Cir. 2001) ("BellSouth"). The Sixth Circuit has also considered this question in a similar case:

> TCG attempts to characterize the City's ordinance as a prohibition, itself prohibited by 47 U.S.C. § 253(a).... This is sophistry. The provider must apply for a franchise; the City assesses a franchise fee; no fee paid, no franchise given. That cannot "be described as a prohibition [within the meaning of section 253(a)]".

TCG Detroit v. City of Dearborn 206 F.3d 618 at 624 (6th Cir. 2000) ("TCG Detroit"). This Court should grant certiorari in this case to resolve the split in the circuits regarding the treatment of § 253(a) and reestablish the proper approach to § 253(a), previously recognized by the Eleventh and Sixth Circuits, by remanding the case to the trial court for a determination as to the actual prohibitory effect of the lease conditions proposed by White Plains.

III. THE DECISION BELOW SPLITS RADICALLY FROM THE SIXTH CIRCUIT'S PLAIN MEANING UNDERSTANDING OF §253(c), EFFECTIVELY IGNORING THE LANGUAGE ADOPTED BY CONGRESS AND REPLACING IT WITH A POLICY SPECIFICALLY REJECTED BY CONGRESS.

Even if, *arguendo*, the Second Circuit had been correct in its assumption that White Plains' proposed lease terms constituted a "prohibition" under § 253(a), such terms would still not be preempted if they are protected by the safe harbor of § 253(c), which provides as follows:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The Second Circuit concluded that the monetary rent proposed by White Plains (structured similarly to the rental charged by White Plains from cable television companies and specifically endorsed for that purpose by Congress in 47 U.S.C. § 542) was not "competitively neutral and nondiscriminatory" because one other telecommunications company, Verizon, is not currently paying White Plains, on a going forward basis, the same monetary rental. But Verizon claims to have acquired its authority to use the streets of White Plains over a century ago, and there is nothing in the record below to indicate that White Plains has the authority to charge Verizon today, on a going forward basis, for an asset that was obtained in the nineteenth century.

If a seller sold a piece of property to Buyer A one hundred years ago, a 1996 requirement that the seller act in a "competitively neutral and nondiscriminatory" manner today does not require the seller to now give away all its property for free to potential Buyers B, C, D, E and F merely because Buyer A no longer has a "going forward" rental obligation with respect to the property it bought a century ago. The Sixth Circuit in TCG Detroit recognized this obvious point, but the Second Circuit explicitly rejected the Sixth Circuit's approach ("we think TCG

Detroit was wrongly decided" TCG New York, Inc. v. City of White Plains 305 F. 3d 67 at 80 (2d Cir. 2002)).

But even if, *arguendo*, such a nonsensical result -- competitive neutrality requiring property to be given away for free in the twenty-first century because others acquired comparable property in the nineteenth century -- were required in theory, in practice in this case it would be entirely unnecessary, because Verizon and TCG operate in profoundly different manners and a "competitively neutral and nondiscriminatory" requirement does not require them to be charged on the same basis. As the District Court in this case recognized, "Bell Atlantic [now known as Verizon] must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers." TCG New York, Inc. v. City of White Plains 125 F. Supp. 2d 81 at 98-99 (S.D.N.Y. 2000). That is, as the District Court below acknowledged, Verizon offers telecommunications facilities and services to every resident and business in White Plains who seeks it, an expensive but profoundly important contribution to the White Plains community, while TCG is a "cherry-picker", building facilities only where it chooses, and generally choosing only locations with the highest concentrations of users of the most profitable, commercial telecommunications service. The plain meaning of the phrase "competitively neutral and nondiscriminatory" makes clear that two companies engaged in such profoundly different kinds of businesses and making such profoundly different levels of public contribution need not, *contra* the Second Circuit, be charged in exactly the same way "going forward".

Indeed, Congress itself recognized these arguments in creating 47 U.S.C. § 253 as enacted. As the District Court below in this case pointed out (125 F. Supp. 2d 81 at

98), the House Commerce Committee sent a version of § 253(c) to the floor of Congress that would have required parity in compensation for local rights-of-way between incumbent local exchange companies such as Verizon and providers such as TCG. But this provision was overwhelmingly rejected on the floor of the House, replaced by the current § 253(c). By interpreting § 253(c) in its current form to be the equivalent of a provision specifically rejected by Congress, the Second Circuit has both split from the Sixth Circuit and failed to abide by the Congressional mandate to respect the property rights of local communities and local authority to make reasonable distinctions between different types of providers in developing compensation requirements.

In sum, this Court should grant certiorari in this case to either (1) remand to the trial court for a determination as to whether White Plains even has the authority to require Verizon to pay the type of monetary compensation in question on a "going forward" basis (without which authority White Plains lacks the capacity to "discriminate" in favor of Verizon), or (2) restore the District Court's conclusion that Verizon and TCG are so different in the nature of their respective businesses and contributions to the community that a difference in going forward compensation received by White Plains from these two companies would not be inconsistent with § 253(c)'s safe harbor.

IV. THE DECISION BELOW FACIALLY INVALIDATES LEGISLATIVE AND REGULATORY LANGUAGE THAT IS CAPABLE OF LAWFUL APPLICATION, AND IS THUS INCONSISTENT WITH §253(a) AND ESTABLISHED PRINCIPLES OF JUDICIAL RESTRAINT.

Even if, *arguendo*, the Second Circuit was correct in its (unsupported) conclusion that lease conditions White Plains sought to require of TCG were "prohibitions" banned by § 253(a), the Second Circuit vastly overreached its authority by preempting a variety of provisions that merely authorized but did not compel administrative or regulatory action, and were entirely amenable of being applied in a lawful way (even by the Second Circuit's inappropriately cramped definition of lawfulness).

For example, the Second Circuit preempts White Plains legislative language that merely authorizes the applicable White Plains administrative body to "reject any application [to use local street property] based on any 'public interest factors... that are deemed pertinent by the City'". The Second Circuit says such legislation "amounts to *a right to prohibit* providing telecommunications services, albeit one that can be waived by the City" [emphasis added] TCG New York, Inc. v. City of White Plains 305 F. 3d 67 at 76 (2d Cir. 2002). But § 253(a) bans prohibition or effective prohibition, not a mere "right to prohibit" that may or may not be exercised in actual application. The provision the Second Circuit cites here is merely a general legislative authorization of an administrative body's power to act. Such legislative empowerment does not prohibit or effectively prohibit any

entity from providing any telecommunications service. Nothing in § 253(a) bans the legislative empowerment of an executive or administrative body. Only the very act of prohibiting or effectively prohibiting the provision of service is banned by § 253(a). So long as the legislative language is capable of being implemented in a way that comports with § 253(a), such legislative language is not preempted. The mere fact that such language is also theoretically capable of being implemented in a manner inconsistent with § 253(a) is not enough to justify preemption.

It is a principle well established by this Court that a mere potential conflict with federal law is not a sufficient basis for preemption of a state or local action. As Justice Rehnquist stated in his opinion for this Court, reversing a preemption decision below in Rice v. Norman Williams Co., 458 U.S. 654 (1982), at 659: "The existence of a hypothetical or potential conflict is insufficient to warrant pre-emption of the state statute."

Indeed, were all state or local legislative language preempted that is merely potentially implemented in a manner inconsistent with § 253(a), throughout the nation many state or local charters, laws and rules, that do nothing more offensive than create or authorize executive or administrative bodies to enter into leases of public property, may be banned, as such charters, laws and rules are, by their nature as authorizing language, likely to be broad and general. The role of state and local legislatures and rulemaking bodies, especially on matters related to property transactions such as those at issue in this case, is to set broad guidelines while leaving the details of individual transactional decisions to the authorized executive agency or administrative body. If the empowered executive or administrator implements its

authority in a manner that does not prohibit or effectively prohibit the provision of telecommunications service, then there is no preemption. As Justice Rehnquist further expressed the matter in the Rice decision, 458 U.S. at 664:

> One might be able to hypothesize an arrangement enforced by the [state's] designation statute that might be prohibited by [the relevant federal statute], but this is insufficient to invalidate a state statute.... "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit* 362 U.S. 440, 446 (1960).

The Court should, in short, grant certiorari to restore the proper balance among the legislative, judicial and executive branches and between the federal courts and state and local authorities, by making clear that state and local laws, rules and provisions capable of being enforced in a manner compliant with § 253(a) are not prohibited by § 253(a), and that preemption is only effective when a provision is either incapable of lawful implementation or is actually implemented in an unlawful manner.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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No. 02-1062

IN THE

Supreme Court of the United States

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC., and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Petitioner is a municipal corporation.

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ARGUMENT

The petitioner, the City of White Plains, New York (the "City"), respectfully submits this Reply to the Brief in Opposition of Respondents ("Opp.").

What Respondents glibly call a "grab bag of issues," Opp. at 13, is in fact a single, coherent argument: the court of appeals made multiple errors, all arising out of the failure to understand that 47 U.S.C. § 253 ("Section 253") represents a deliberate rejection by Congress of federal pre-emption of local authority over rights-of-way management and compensation. The Second Circuit disregarded the text of the statute, the legislative history, and the presumption in the law against preemption of local police regulations. Each of the questions presented deals with an aspect of local authority that Congress preserved and the court of appeals wrongly infringed.

A. Respondents Cannot Avoid the Central Flaw in the Second Circuit's Decision: the Statutory Term "Prohibit" Does Not Mean "Having an Effect on Competition."

The Second Circuit's opinion plainly states that the City's Telecommunications Franchising and Licensing Ordinance (the "Ordinance") violated Section 253(a) because "of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains on a fair basis. . . . ." Pet. App. at 15a. Thus, the Second Circuit effectively interpreted the term "prohibition" to mean "obstacle to fair competition." This distortion of the word "prohibition" is reversible error regarding an important question of federal law. Respondents' arguments on this point at Opp., p. 16, all fail because they ignore the central problem with the decision below: "to prohibit" does not mean "to condition" or "to impede." Furthermore, while, an actual prohibition is a

barrier to competition, not all barriers to competition are necessarily prohibitions.

Respondents attempt to avoid this problem by invoking *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Respondents assert that the City "concedes" that Section 253(a) is ambiguous. Opp. at 15. But the City has made no such concession. Section 253 as a whole has been a cause of *confusion*; this does not mean that subsection (a) is *ambiguous*. The word "prohibit" is not ambiguous and is directed at provisions that maintain the traditional monopoly service provider model. *See Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 98 (1st Cir. 1999). The phrase "has the effect of prohibiting" refers simply to provisions that in combination serve to maintain the monopoly model. It does not set up a separate class of preempted provisions. Nothing in the City's Ordinance precludes entry by additional providers, and in fact the City has granted other licenses and franchises. Pet. App. at 30a, n. 2; 57a.

Because Section 253(a) is not ambiguous, the FCC's interpretation of Section 253(a) is not entitled to deference.[1] *Chevron*, 467 U.S. at 843-45.

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[1] Respondents claim that the court of appeals adopted an interpretation of the FCC, Opp. at 15, citing *Public Util. Comm'n of Texas*, 14 FCC Rcd 3460 (1997). But the court of appeals did not cite that decision; instead, it cited *In re California Payphone Ass'n, Memorandum Opinion and Order*, 12 FCC Rcd. 14,191 (1997). See Pet. App. 15a. The *Cal. Payphone* case did adopt a standard for finding whether a provision "has the effect of prohibiting," which was restated in the decision cited by Respondents. *Cal. Payphone*, 12 FCC Rcd 14,191 at ¶ 31. But in *Cal. Payphone*, the FCC (1) upheld a local ordinance that prohibited the installation of payphones outdoors on private property; and (2) upheld an agreement with the incumbent local exchange carrier for installation of payphones outdoors in the public rights-of-way. The truth is that the Second Circuit did not conduct the same analysis or apply the same

Finally, Respondents incorrectly claim that the case is factbound, asserting that the City would have the Court reconsider whether there was a delay in processing Respondents' franchise application. Opp. at 18-19. The question presented, however, is whether the court of appeals applied an incorrect interpretation of Section 253(a), for any purpose. The court of appeals did not state that delay was an independent ground for its decision. *See* Pet. at 18, n. 19. But even if the court of appeals considered delay a separate "prohibition" from the terms of the Ordinance, the court presumably applied the same wrong interpretation of the statute in both instances. After all, the statute does not say that "delay" is a basis for preemption; only a "prohibition" can be preempted, and the court of appeals only recited one legal standard. Consequently, the case is not factbound, and turns on the legal issue of what is a "prohibition."

B. The FCC Cannot Give the Courts Guidance on the Meaning of Section 253(c) Because the Statute Expressly Denies the Agency the Power To Interpret that Provision.

Respondents suggest both that the FCC has the power to interpret Section 253(c), and that the agency has in fact done so in a fashion relevant to the issues in this case.[2]

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standard as the FCC did in *Cal. Payphone*. The court of appeals actually created a new, broader, and vaguer standard.

[2] Opp. at 10-11. Respondents also allege that the Petition "misrepresented the nature of the FCC's participation" and failed to disclose the FCC's initial *amicus* brief. Opp. at 11. This is false. The FCC's initial brief was disclosed on page iii of the Petition, along with the briefs filed by other amici. The initial brief was not mentioned in the discussion of the supplemental brief because it was not relevant to the point at issue, which was that when subsequently asked specific questions by the court of appeals, the agency declined to provide the requested guidance. Pet. at 15-16. Respondents also allege that in

Neither is correct. In the Petition, the City made the point that this Court should provide guidance on the meaning of Section 253 because the lower courts will not receive the necessary guidance in these cases from any other source. This is true: no statement by the FCC regarding the meaning of Section 253(c) is entitled to any deference from the courts.[3] *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) (*Chevron* does not extend to matters over which an agency has no authority). The FCC has no policy-making power or expertise regarding local rights-of-way.[4] And

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reproducing the Ordinance in the Appendix of the Petition, the City omitted a provision that they assert gave the City "legal sanction to discriminate," implying that this was a key provision. Opp. at 5, n.1. The provision in question is not part of the Ordinance as codified, and was not one of the provisions challenged or discussed below. *See* Pet. App. 4a and 28a, in which each court refers to the City Code and cites "Articles 1-3" of the Ordinance; Articles 1-3 appear in the Appendix in their entirety. Contrary to Respondent's fanciful interpretation, Opp. at 5, the quoted language formed no part of the analysis of either of the opinions below.

[3] This includes the FCC's two *amicus* briefs. Respondents correctly note, Opp. at 11, that in its initial *amicus* brief the FCC made certain statements about compensation and competitive neutrality. In view of Section 253(d), however, the FCC is entitled to no deference regarding matters within the scope of Section 253(c). Furthermore, by the FCC's own admission it "was not intended to represent a definitive FCC position." *See* Letter from Jane E. Mago, FCC General Counsel, to Kenneth S. Fellman, Chairman of the FCC's Local and State Government Advisory Committee (Oct. 18, 2001) (responding to concerns regarding footnote in brief discussing meaning of term "compensation" in Section 253) (copy appended to this Reply). Indeed, other than the two *amicus* briefs, the FCC has largely avoided speaking on any of the relevant issues. Under the circumstances, neither of the FCC's briefs was entitled to any deference. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

[4] The closest the agency comes to having any expertise or jurisdiction over rights-of-way is its authority over pole attachments. 47 U.S.C. § 224. The Pole Attachment Act was adopted precisely because the FCC itself had concluded that it had no authority over utility poles and rights-

Section 253(d) specifically precludes the FCC from enforcing matters that are excluded from Section 253(a) by Section 253(c), thus withholding jurisdiction over local rights-of-way.[5] Indeed, although numerous courts have addressed Section 253(c), Respondents are unable to cite a single FCC decision that actually addresses the issues at the heart of this case.

Finally, despite the specific request of the court of appeals, in its supplemental *amicus* brief below, the FCC provided only the most limited answers to the court's questions, and acknowledged that there are "potential issues involving the Commission's jurisdiction under Section 253(c)."[6]

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of-way. SEN. REP. 95-580, at 14 (1977). And the FCC's pole attachment authority extends only to rates and conditions for use of utility facilities; it does not extend to terms and conditions for the use of public rights-of-way. The FCC has no expertise or authority regarding such matters as supervising construction in the rights-of-way, coordinating the activities of multiple users, or proper civil engineering techniques. Nor does it have any expertise or authority regarding compensation for the use of public property.

[5] Contrary to Respondents' argument, Opp. at 15 n.2, the FCC's rulemaking authority under 47 U.S.C. § 201(b) does not apply here, because Congress deliberately and explicitly withheld such authority in Section 253(d). For purposes of Section 201(b), therefore, the "provisions of this Act" regarding which the FCC may adopt rules specifically exclude local right-of-way management and compensation. The express exclusion in Section 253(d) makes this case different from *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999).

[6] Supplemental Brief of the Federal Communications Commission and the United States as *amici curiae*, filed in the court of appeals March 12, 2002, at 7, *citing Petition of the State of Minnesota*, 14 FCC Rcd 21697, ¶ 63 (1999).

C. The Factual Distinctions Between *Dearborn* and *White Plains* Are Irrelevant and There Is a Direct Conflict Between the 2d and 6th Circuits on the Compensation Issue.

In *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), the Sixth Circuit held that the city could charge new providers a fee even though it was not charging the incumbent. In *White Plains*, the Second Circuit held that the City could not charge new providers a fee if did not charge the incumbent. The only difference between the two cases is that in *Dearborn* the court ruled that the incumbent was exempt under state law. But the effect on competition – otherwise the touchstone of Respondents – is the same in both cases. If the Second Circuit was correct when it said that Section 253 "forbids fees that are not competitively neutral, period," Pet. App. at 21a, then the reason for the disparate treatment is irrelevant. Respondents cannot have it both ways: if the effect on competition is the key, then there is indeed a conflict in the two judgments.

Respondents also defend the Second Circuit's assertion that only forward-looking costs are relevant in applying Section 253(c)'s competitive neutrality standard, citing this Court's decision in *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467 (2002). Opp. at 21. But *Verizon* bears only the remotest resemblance to the issues in this case. First, *Verizon* was concerned with rates paid by competitors for the use of the incumbent's facilities under 47 U.S.C. § 252 – it says nothing about rents for the use of real property controlled by non-providers, such as the public rights-of-way. Second, the Court was not approving a methodology, but deferring to the agency's interpretation of the undefined statutory term "cost." In this case, Section 253 does not use the term "cost," and in any event, as discussed above, Congress has withheld from the FCC authority to address matters of compensation. So while in *Verizon* the FCC may have had discretion to exclude past consideration in setting prices for unbundled

network elements, there is no general rule of law that says that past consideration must be excluded. Indeed, as the City of New York demonstrates in its *amicus* brief, the fact that one user may have paid an owner for the right to use property in the past does not mean that the owner must now give away comparable property to newcomers at no charge. Brief of *amicus curiae* City of New York at 10-11.

Respondents also fail to acknowledge that even taken on its own terms there is a fundamental contradiction within the Second Circuit's decision. The Second Circuit expressly stated that free use of conduit space could be an element of compensation, Pet. App. at 22a, yet the court failed to recognize that the City's current and continuing right to use Verizon's conduit has a value. Even if past consideration may not be considered, the City receives a future benefit and Verizon forgoes receipt of future rent. The future right to use the conduit has a value, and a rough parity test would demand that that value be compared to the fee requested of Respondents. That is why, if it had followed its own logic, the court of appeals should have remanded the case to the district court.

Respondents place the burden of the Second Circuit's error on the City, essentially claiming that the City had the burden of proving the value of the conduit. Opp. at 23. But this ignores the procedural posture of the case: the City won on the compensation issue in the district court, and the case was decided on summary judgment. The future value of the conduit is only an issue because of the logic of the decision of the court of appeals. So if the judgment of the court of appeals were correct, justice would require a remand.

But of course, the court of appeals and the Respondents are wrong, because the statute does not demand any kind of parity. Congress addressed the very question of the possible disparate treatment of incumbent and competitive carriers in debate on the floor of the House, and

one of the reasons for the adoption of Section 253(c) was to allow for precisely the kind of situation posed by the facts of this case. 141 CONG. REC. H8460-61 (Aug. 4, 1995) (daily ed.). The district courts in both *Dearborn* and *White Plains* recognized this, which is why they reached the opposite result. *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 792 (E.D. Mich. 1998); Pet. App. at 59a-63a. Indeed, the district court below found that there are essential differences between the two classes of companies, which justify different treatment: Verizon "must offer universal service and affordable rates to the City's residents, while new entrants such as TCG may limit their offerings to the most profitable business centers." Pet. App. at 61a.

In short, the judgment of the Second Circuit was wrong, and there is a clear conflict between the Sixth and Second Circuits.

D. The Non-Fee Provisions Are Worthy of Review Because They Raise Fundamental and Important Questions About the Scope of Federal Power To Preempt Local Legislative Discretion.

The non-fee provisions that were preempted by the court of appeals are worthy of this Court's review because the decision and reasoning of the court of appeals go to the heart of the relationship between federal and local government power. Respondents claim that the court of appeals merely applied Section 253(c) according to its terms, and that "federal law does not permit the City to deny or condition the access of telecommunications providers to public rights-of-way for any reason they deem to promote the public interest." Opp. at 25. But this completely begs the question. Section 253 does not expressly preempt all provisions that include a public interest standard. Nor does the statute create a presumption of preemption, particularly in light of the many expressions in the Telecommunications

Act itself,[7] and its legislative history, of Congress's intent to respect local prerogatives. Merely because a local law contains a public interest standard does not mean it is a Section 253 "prohibition." Nor does Section 253 demand preemption of a local provision that has never even been applied. It is difficult to see how the mere reservation of the right to consider the public interest can be considered to "prohibit or have the effect of prohibiting" the provision of service. By preempting those provisions containing the public interest standard before they were ever applied, the court of appeals improperly applied a form of strict scrutiny.[8]

Respondents miss the point of the City's argument regarding the Constitutional provisions. Opp. at 25-26. The City does not claim that Section 253 itself is unconstitutional. The constitutional issues arise because the Second Circuit ignored its obligation to construe the statute in a way that avoids constitutional problems. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals must have been aware that in preempting local legislation governing a matter of traditional local control, it was treading on dangerous ground. *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989); *see also Solid Waste Agency of No. Cook Co. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Whether a federal

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[7] In addition to Sections 253(c) and (d), *see* Section 601(c)(1) of the Telecommunications Act of 1996, 110 Stat. 56, 143, codified at 47 U.S.C. § 152 nt.

[8] Respondents fail to comment on n. 28 of the Petition, where we observe that every one of the "public interest" provisions included language limiting its scope to matters that the City could lawfully consider. This makes the rationale of the judgment below even more difficult to understand, since even if strict scrutiny were permissible, its application was unnecessary. The court of appeals appears to have "extend[ed] its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

court can divest a local legislative body of final discretion over the grant or transfer of the right to use local property is an important question. Respondents would have ample opportunity to address the issue in their brief on the merits, and thus would not be prejudiced.

Finally, Respondents also miss the point when they say that the non-fee provisions "would have violated the competitive neutrality requirement of Section 253(c)" because they were not imposed on Verizon. Opp. at 25. First, it is by no means clear that the competitive neutrality requirement applies to non-compensation provisions. *Cablevision of Boston,* 184 F.3d at 105. And second, the provisions in question[9] were never actually applied to Respondents; the court of appeals wrongly struck those provisions down as facially invalid.

CONCLUSION

The City's petition for a writ of *certiorari* should be granted.

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[9] Ordinance, §§ 2-7-01(vi); (vii); 2-9-01(xii); (xvii) (Pet. App. at 10b, 12b, 13b); August Proposal, § 14 (Pet. App. at 9d-13d).

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Re: FCC *Amicus* Brief in *TCG New York, Inc., et al. v. City of White Plains*

Dear Ken:

Thank you for your letter expressing LSGAC's concerns about footnote 7 in the Commission's *amicus* brief in the *White Plains* case. The Commission was involved in the *City of White Plains* case as an *amicus* to express the agency's position that costs imposed on new entrants, but not incumbents are not "competitively neutral and non-discriminatory" under Section 253(c) of the Communications Act, 47 U.S.C. § 253(c). Because the validity of gross revenues based-fees was an issue discussed extensively in the main party briefs, we felt a need to acknowledge the issue and did so in footnote 7. As we have discussed, however, the footnote was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery. Indeed, we recognized that this is an issue that continues to develop in the courts and before the Commission, and we deliberately limited our discussion of the issue in the *amicus* brief.

We share your concern that others are mis-representing the language of the brief. It is regrettable that some people are misusing it in the way described in your

letter. This is not the first time that has happened with a brief filed by the Commission. In our experience, we believe that the best approach to dealing with this problem is to allow the brief to remain filed with the court as written. The brief says what it says, and the Commission filed the brief with some care to avoid taking a firm position on revenue-based fees. If and when parties review the brief, they will see that is the case. Indeed, if the Commission were now to withdraw the brief or the portion including footnote 7, we believe that action could similarly be misconstrued. Therefore, we are not inclined to take any action with respect to your request.

Thanks again for keeping us informed of developments related to this issue, and please let us know if there are further developments.

Very truly yours,

Jane E. Mago
General Counsel

No. 02-1062

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF WHITE PLAINS,

Petitioner,

v.

TCG NEW YORK, INC., TC SYSTEMS, INC.,
and TELEPORT COMMUNICATIONS dba TCNY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

Certificate of Service

I hereby certify that I have caused to be mailed this day three copies of the City of White Plains' Reply to the Opposition of Respondents to the following counsel for the opposing parties:

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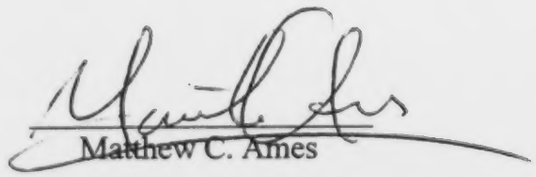

Matthew C. Ames

Washington, D.C.
March 10, 2003